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No. 98-___

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

MARTIN CROMARTIE, *et al.*,
Appellants,

v.

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, *et al.*,
Appellees.

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

JURISDICTIONAL STATEMENT

MARTIN B. McGEE
Williams, Boger, Grady
Davis & Tuttle, P.A.
P.O. Box 810
Concord, NC 28026-0810
(704)-782-1173

ROBINSON O. EVERETT*
Everett & Everett
P.O. Box 586
Durham, NC 27702
(919)-682-5691

**Counsel of Record*

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QUESTIONS PRESENTED

1. After the 1992 and 1997 redistricting plans had been held unconstitutional as racial gerrymanders and the General Assembly had enacted a new plan, was the district court required to determine that any unconstitutional vestiges of the earlier plan had been removed before allowing the 1998 plan to be used in elections?

2. In determining whether the 1998 plan was an adequate remedy for the unconstitutional defects of the 1992 and 1997 racial gerrymanders, should the three-judge district court have placed on the State defendants the burden of proving that race did not predominate as a motive in drawing Districts 1 and 12?

LIST OF PARTIES

MARTIN CROMARTIE, THOMAS CHANDLER MUSE, R.O. EVERETT, J.H. FROELICH, JAMES RONALD LINVILLE, SUSAN HARDAWAY, ROBERT WEAVER and JOEL K. BOURNE are appellants in this case and were plaintiffs below;

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, DENNIS WICKER in his official capacity as Lieutenant Governor of the State of North Carolina, HAROLD BRUBAKER in his official capacity as Speaker of the North Carolina House of Representatives, ELAINE MARSHALL in her official capacity as Secretary of the State of North Carolina, and LARRY LEAKE, S. KATHERINE BURNETTE, FAIGER BLACKWELL, DOROTHY PRESSER and JUNE YOUNGBLOOD in their capacity as the North Carolina State Board of Elections, were defendants below and are appellees in this case.

ALFRED SMALLWOOD, DAVID MOORE, WILLIAM M. HODGES, ROBERT L. DAVIS, JR., JAN VALDER, BARNEY OFFERMAN, VIRGINIA NEWELL, CHARLES LAMBETH and GEORGE SIMKINS were allowed to intervene of right as defendants at the time of the order appealed from; and as defendant-intervenors they are included as appellees.

Apart from the defendant-intervenors who are included as appellees in this appeal, the parties in this case are the same as in the separate appeal filed earlier in *Hunt v. Cromartie*, No. 98-85, in which the present appellants, Cromartie, *et al.*, who were plaintiffs in the three-judge district court, were appellees and the present appellees, Hunt, *et al.*, who were defendants below, were appellants.

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No. 98-___

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October Term, 1998

MARTIN CROMARTIE, *et al.*,
Appellants,

v.

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, *et al.*,
Appellees.

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

JURISDICTIONAL STATEMENT

Martin Cromartie and the other Plaintiffs below appeal from the Order of the United States District Court for the Eastern District of North Carolina, dated June 22, 1998, which denied to appellants the temporary and permanent injunction which they had sought to enjoin the State appellees from conducting any elections under the congressional redistricting plan enacted by the North Carolina General Assembly on May 21, 1998. *See* 1998 N.C. Sess. Laws, Ch. 2, amending N.C. Gen. Stat. § 163-201(a). Plaintiffs filed notice of appeal on July

17, 1998 and jurisdiction of this appeal is conferred on this Court by 28 U.S.C. § 1253.

OPINION BELOW

The June 22, 1998 opinion of the three-judge district court, which has not yet been reported, appears in the appendix to this jurisdictional statement at 1a.

JURISDICTION

The district court's order denying the injunction was entered on June 22, 1998. On July 17, 1998, appellants filed a notice of appeal to this Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal concerns the constitutionality of 1998 N.C. Sess. Laws, Ch. 2, which amended N.C. Gen. Stat. § 163-201(a); copies of this Session Law were previously lodged with the Court by the present appellants in connection with the Motion to Dismiss or, in the Alternative, to Affirm which they filed in *Hunt v. Cromartie* (No. 98-85), where they are appellees.

The present appeal involves the Equal Protection Clause of the Fourteenth Amendment which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

> United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This appeal is taken pursuant to 28 U.S.C. § 1253 which provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

STATEMENT OF THE CASE[1]

In *Shaw v. Hunt,* 517 U.S. 899 (1996) ("*Shaw II*"), the Court held that District 12 in North Carolina's 1992 congressional redistricting plan ("the 1992 plan") violated the Equal Protection Clause because race predominated in the design of the Twelfth Congressional District, and the plan could not survive strict scrutiny. The Court declined to consider the constitutionality of the First District in the 1992 plan because none of the plaintiffs had standing. Therefore, a separate action was initiated by Martin Cromartie and other registered voters in the First District to challenge its constitutionality.

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[1] The present appellants have provided the Court a more detailed statement of the relevant facts in their Counterstatement contained in the Motion to Dismiss or, in the Alternative, to Affirm which they filed in *Hunt v. Cromartie* (No. 98-85), which involves the same parties.

The action filed by Cromartie was stayed by consent awaiting further proceedings in the *Shaw* litigation, which had been remanded to the lower court. That court granted the State legislature an opportunity to redraw the State's congressional plan to correct its constitutional defects; and on March 31, 1997, the North Carolina General Assembly enacted a new congressional redistricting plan, 1997 Session Laws, Chapter 11 ("the 1997 plan"). The 1997 plan was precleared by the Department of Justice for use in the 1998 and subsequent elections; and in September 1997 it was accepted by the lower court as a remedy for the claim asserted by the *Shaw* plaintiffs, who under the 1997 plan were no longer residents of the Twelfth District.

Shortly thereafter, the stay in the action brought by Cromartie was dissolved; and an amended complaint was filed, which alleged that the 1997 redistricting plan was also an unconstitutional racial gerrymander and that race had predominated in drawing both its First District and its Twelfth District. The amended complaint included as plaintiffs registered voters both of the First and the Twelfth Districts.

After a hearing on March 31, 1998, the three-judge district court before which the case was pending granted summary judgment for the plaintiffs as to the Twelfth Congressional District and enjoined the defendants from conducting any primary or general election under the 1997 redistricting plan.[2] The state defendants gave notice of appeal and also applied unsuccessfully to the district court and to this Court for an emergency stay of the injunction. Subsequently, the State defendants filed a Jurisdictional Statement in this Court, *Hunt v. Cromartie* (No. 98-85); and in response the

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[2] See Appendix 1a, 4a, 45a of the Jurisdictional Statement filed in *Hunt v. Cromartie* (No. 98-85).

plaintiffs have filed a Motion to Dismiss or, in the Alternative, to Affirm, which is now pending.

Instead of immediately undertaking to draft its own redistricting plan in order to remedy the constitutional defects, the three-judge district court allowed the General Assembly an opportunity to enact still another redistricting plan. On May 21, 1998 a new plan ("the 1998 plan") was enacted, which was to be used for the 1998 and 2000 elections, unless this Court reverses the district court decision holding the 1997 plan unconstitutional. *See* 1998 N.C. Sess. Laws, Ch.2. After the Department of Justice had precleared this plan, the plaintiffs filed an opposition and objection to that plan; and the defendants responded thereto.

On June 22, 1998, the three-judge district court approved this plan "with respect to the 1998 congressional elections," because the court "concludes that on the record now before us that race cannot be held to have been the predominant factor in redrawing District 12." (Appendix at 3a.) However, the district court reserved "jurisdiction with regard to the constitutionality of District I under this plan and as to District 12 should new evidence emerge," and it directed that the case "should therefore proceed with discovery and trial accordingly." (App. at 5a.)[3] The plaintiffs gave notice of appeal with respect to this order.

ARGUMENT

Introduction

This appeal is taken to present for the Court's decision questions which concern the obligations of the three-judge

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[3] Subsequently, a discovery schedule has been approved by the district court.

district court in determining whether to accept a new redistricting plan as an adequate remedy for defects in two earlier plans held to be unconstitutional racial gerrymanders. The context for these questions is provided by the language of the order entered below denying the requested injunction. There the three-judge district court stated:

> Because the Court cannot now say that race was the predominant factor in the drawing of District 12 in the 1998 congressional districting plan, the revised plan is not in violation of the United States Constitution, and the 1998 congressional elections should proceed as scheduled in the Court's April 21 order.

(App. at 1a.) Later in the order, the court commented that it "now concludes that on the record now before us that race cannot be held to have been the predominant factor in redrawing District 12." (App. at 3a.)

Some months earlier, in rendering its memorandum opinion holding unconstitutional the State's 1997 redistricting plan, the court explained its methodology in considering a remedial plan.[4] Citing *Wise v. Lipscomb*, 437 U.S. 535 (1978), the opinion states:

> Thus, when the federal courts declare an apportionment scheme unconstitutional – as the Supreme Court did in *Shaw II* – it is appropriate, 'whenever practicable, to afford a

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[4] This memorandum opinion appears at pages 1a-23a of the jurisdictional statement submitted by the defendants, who were then appellants, in their jurisdictional statement in *Hunt v. Cromartie* (No. 98-85).

> reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan. The new legislative plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution.'

Wise, 437 U.S. at 540.

As the district court's language reveals, it reasoned that after a new redistricting plan has been enacted, those who wish to challenge it must start anew and the plan is to be viewed as if it had been written on a clean slate. No effort was made by the court to examine what "vestiges" of the prior racial gerrymanders might remain. The first question presented in this appeal arises out of the district court's failure to recognize or perform its duty of assuring that the "vestiges" of the unconstitutional 1992 and 1997 racial gerrymanders were eliminated.

The second question concerns the burden of proof. When the plaintiffs expressed their opposition to the 1998 plan, the district court placed on them the burden to demonstrate that race had been the predominant motive in redrawing District 12. Instead, the burden should have been placed on the defendants to show that race had not been the predominant factor; and use of the plan should not have been allowed unless the court concluded on the record before it that race had not been the predominant factor in redrawing District 12.

These errors on the part of the court below caused it to deny the temporary and permanent injunctions which plaintiffs sought. If these omissions on the district court's part are repeated at the forthcoming trial which that court has ordered,

the plaintiffs will be further prejudiced in obtaining the relief to which they are entitled. Moreover, the questions presented in this appeal have added importance because they will arise in other litigation involving the adequacy of a new redistricting plan as a remedy for a plan that a court has held to be an unconstitutional racial gerrymander.

I. The Court Below Had the Duty to Determine That No "Vestiges" of the Earlier Unconstitutional Plans Remained in the 1998 Plan.

After racial segregation of schools was held to violate equal protection guarantees, many federal district courts were required to oversee the process of school desegregation. As guidance for the district court overseeing desegregation of the Charlotte-Mecklenburg school system, this Court pointed out that once the equal protection violation had been proved, the local school authorities and the district court were required to "eliminate . . . all vestiges of state-imposed segregation." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971).[5] In another school desegregation case, the Court made clear that the Dayton Board of Education was under a continuing duty to eradicate the effects of segregated schools. *See Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 537 (1979).

Consistent with these pronouncements, the Court of Appeals for the Tenth Circuit ruled that once plaintiffs had established a prima facie case of *de jure* segregation, the defendant board of education had the duty to prove that its efforts to comply with desegregation orders had "eliminated all traces of past intentional segregation to the maximum feasible extent." *Brown v. Board of Education*, 892 F.2d 851, 859 (10th

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[5] Such "vestiges" included faculty assignments, transportation, student assignments, and "racially-identifiable" schools. *See United States v. Lawrence County Sch. Dist.*, 799 F.2d 1031, 1043 (5th Cir. 1986).

Cir. 1989). Similarly, the Fifth Circuit has explained that the failure of school authorities to satisfy their obligation to eradicate the "vestiges" of *de jure* segregation is itself a constitutional violation. *See Taylor v. Ouachita Parish School Board*, 648 F.2d 959, 967-68 (1981); *see also Ross v. Houston Independent School District*, 699 F.2d 218, 225 (5th Cir. 1983) (a school system "must eradicate, root and branch, the weeds of discrimination"). Implementing the same policy of eradicating the "vestiges" of the equal protection violation implicit in racially-segregated schools, the Court of Appeals for the Fourth Circuit stated that once the violation had been established, a plaintiff is "entitled to the presumption that current disparities are causally related to prior segregation, and the burden of proving otherwise rests on the defendants." *School Bd. of the City of Richmond v. Baliles*, 829 F.2d 1308, 1311 (4th Cir. 1987). *See also Vaughan v. Board of Educ.*, 758 F.2d 983, 991 (4th Cir. 1985).

A helpful analogy is provided by cases discussing the effects of the violation of due process rights. Recognizing that evidence which is the "fruit of the poisonous tree" is inadmissible without regard to its credibility, the Court held that a confession obtained shortly after an unconstitutional search and arrest could not be received as evidence. *See Nardone v. United States*, 308 U.S. 338 (1939).[6] Similarly, a confession is inadmissible if it is the "fruit" of an illegal arrest which has preceded it. *See Brown v. Illinois*, 422 U.S. 590 (1975); *Dunaway v. New York*, 442 U.S. 200, 216-19 (1979); *Taylor v. Alabama*, 457 U.S. 687 (1982).

It seems only logical that the right of a voter to

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[6] *Wong Sun v. United States*, 371 U.S. 471 (1963), which first used the term "fruit of the poisonous tree," involved only a statutory violation rather than a violation of the Constitution.

participate in an electoral process untainted by equal protection violations should be given at least as much protection as the right of schoolchildren to be freed from the effects of racially segregated schools or of criminal defendants to be shielded from the use of evidence that was the "fruit" of violations of the Fourth Amendment. Indeed, if the right to vote is the most fundamental right of citizenship in a democracy – which seems indisputable – it should receive even more protection than other constitutional rights. Although appellants recognize that the Court is concerned that the judiciary not interfere unduly with the work of state legislatures or of the Congress, cf. *Wise v. Lipscomb*, supra, the cited precedents plainly support the proposition that the three-judge district court had the responsibility to assure that "vestiges" of an earlier racially gerrymandered redistricting plan are eliminated and that a replacement plan is not the "fruit" of the earlier unconstitutional plan.[7]

Although in the *Shaw* litigation the Court imposed the requirement that plaintiffs demonstrate that race was the predominant motive for creating the Twelfth District in the 1992 plan, appellants submit that a different test should be applied in determining whether a replacement plan retains "vestiges" of the earlier plan. Usually, in determining whether questioned legislation violates equal protection, the issue is whether that legislation would have been enacted in the

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[7] The Court has also made clear that persons guilty of a breach of trust should not retain the benefits of that breach. *See, e.g., Snepp v. United States*, 444 U.S. 507, 515 (1980) (imposing a constructive trust on proceeds received by a former CIA employee in violation of his contract with that agency.) Here, political benefits resulting from a constitutional violation are being retained by persons who participated in the violation and their retention is being justified under the guise of "incumbent protection" and "maintaining partisan balance."

absence of a race-based purpose. *See Village of Arlington Heights v. Metropolitan Dev. Corp.*, 429 U.S. 252, 265-66 (1977); cf. *Hunter v. Underwood*, 471 U.S. 222 (1985); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Washington v. Davis*, 426 U.S. 229 (1976). Only if the *Arlington Heights* test is employed can a district court be assured that the "taint" of an earlier racial gerrymander has been eliminated. Moreover, having already deprived its voters of equal protection by an unconstitutional racial gerrymander – and in North Carolina's case two such gerrymanders – the legislature cannot complain if the Court applies to its most recent replacement plan the standard usually employed in determining whether equal protection requirements have been violated.

In any event, nothing in the opinion of the court below reflects any awareness on its part of its responsibility to assure that "vestiges" of the racially-gerrymandered 1992 plan were not still present in the 1998 plan.[8] Indeed, had the Court considered whether those "vestiges" were still present, it would quickly have concluded that the 1998 plan reflects no genuine attempt to eliminate "vestiges" of the 1992 plan, which this Court analogized to "apartheid" and ruled unconstitutional. Even a visual comparison of the 1998 plan with the 1992 plan, which this Court held unconstitutional, with the 1997 plan, which the district court held unconstitutional, reveals that the

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[8] Even though this Court did not rule on the constitutionality of the First District in the 1992 plan because of a lack of standing of the *Shaw* plaintiffs, Cromartie and his fellow plaintiffs – who are now appellants – have consistently claimed that the original First District was an unconstitutional racial gerrymander. If that premise is correct – which seems obvious in light of the District's demographics and lack of geographical compactness – the lower court was also under a duty to assure that the First District as it exists in the 1998 plan has none of the "vestiges" of the earlier First District and is not the "fruit" of that poisonous tree.

current plan retains many "vestiges" of its predecessors. For example, the Twelfth District still is not "geographically compact." Although not all of its counties are divided – as was true in the 1992 and 1997 plans – four of its five counties are split in the new plan; and this ratio is higher than for any of North Carolina's eleven other districts.[9]

The 1998 plan still links two of the State's most populous counties, Mecklenburg and Forsyth – which are in different Metropolitan Statistical Areas (MSAs) and different media markets and which, until 1992, had not been in the same congressional district since the eighteenth century. Moreover, in the segments of Mecklenburg and Forsyth counties included in the Twelfth District, the percentage of African-Americans is much higher than the corresponding percentage in the total population of each of these counties. Likewise, the percentage of African-Americans in each of these counties is much higher than in any of the three counties which are used to link Mecklenburg with Forsyth. Thus – just as in the 1992 plan, held unconstitutional in *Shaw* – a predominantly rural, "white corridor" was created to link artificially two unrelated black-concentrated urban cores located in separate metropolitan areas.[10] Furthermore, apart from Guilford County, which was

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[9] The only other significant splitting of counties is related to the creation of the First District, which appellants have consistently contended retains the "vestiges" of the racially-gerrymandered First District in the 1992 plan. The pending discovery and trial in this case will enable appellants even more fully to demonstrate not only that the 1992 plan's First District – which stretched from Virginia almost to South Carolina and divided numerous counties – was a flagrantly unconstitutional racial gerrymander but also that its continuing "taint" is obvious in the First District of the 1997 and 1998 plans.

[10] For another example of the use of such corridors, *see Miller v. Johnson*, 515 U.S. 900 (1995).

totally removed from District 12, only three precincts having forty percent or more African-American population were removed from the 1997 plan's District 12 when the 1998 plan was redrawn.[11]

If percentages of African-American population are reflected on a map of the state's urban areas – areas which are for the most part in the Piedmont[12] – it becomes readily apparent that the black population is sufficiently dispersed that no urban district can be drawn which will conform with traditional race-neutral redistricting principles and yet will have a population which is much more than 25% African-American. Any significantly higher concentration of African-Americans within a single district in the Piedmont – where they are primarily located in urban areas – is an obvious "vestige" of the unconstitutional 1992 and 1997 plans. Over 35% of the population of the "new" Twelfth District is African-American -- a percentage which can only be explained as the result of a predominant purpose to group voters by race across separate metropolitan areas.

In its memorandum opinion of April 14, 1998, which invalidated the 1997 redistricting plan, the three-judge district court stated that, in redrawing the plan, "the legislature may consider traditional districting criteria, including incumbency considerations, to the extent consistent with curing the

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[11] Guilford County, which has several precincts with a high percentage of African-Americans was totally removed from the Twelfth District. Ironically, Guilford County – unlike Mecklenburg County – is in the same Metropolitan Statistical Area (MSA) and same television market (DMA) as the adjacent Forsyth County; and also it is the only county in the 1997 version of District 12 that was subject to preclearance under Section 5 of the Voting Rights Act. *See* 42 U.S.C. § 1973c.

[12] Appellants lodged such maps with the Court in *Hunt v. Cromartie* (No. 98-85) in which they were the appellees.

constitutional defects."[13] Presumably, when the district court permitted use of the 1998 plan for the current elections, it was continuing to allow legislators to rely on "incumbency considerations" – to which the General Assembly admittedly had given great weight in drawing that plan.

Although appellants recognize that in the first instance a legislature may consider "incumbency" in redistricting, allowing "incumbency" to be considered when the Representatives in office have been elected pursuant to a racially-gerrymandered plan is inconsistent with eliminating the "vestiges" of that plan. The flagrantly unconstitutional 1992 plan has now been used for three congressional elections; and the present Representative for the Twelfth District has been elected three times from an unlawfully-drawn race-based district created with the express objective of assuring election of an African-American to Congress from that district. To allow a plan to be drawn which has as its purpose – or even considers – the protection of this Representative's race-based incumbency is at odds with removing the "taint" of the 1992 plan.[14] An acknowledged goal of the General Assembly was to "maintain the partisan balance of the State's congressional delegation." (App. at 4a.) Maintaining a "partisan balance" which has resulted from elections conducted under an unconstitutional race-based plan also is at odds with removing "vestiges" of the earlier gerrymandering.[15] Indeed, in North

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[13] *See Hunt v. Cromartie* (No. 98-85), Appendix to J.S., at 22a.

[14] Of course appellants are not contending that this incumbent should be disqualified from running or that an effort should be made to penalize him; but the General Assembly's effort to help him attain reelection conflicts with the basic goal of removing unconstitutional "vestiges." Also it induces in voters a loss of hope for participating in the electoral process.

[15] The same can be said with respect to the General Assembly's purpose "to keep incumbents in segregated districts and preserve the cores of those

Carolina, which now has six Democratic incumbents and six Republican incumbents, "maintaining partisan balance" is a euphemism for retaining the status quo, keeping in office incumbents elected pursuant to a race-based redistricting plan, and thereby perpetuating the unconstitutional results of the gerrymandering.[16]

As seems clear from its opinions, the three-judge district court did not recognize its duty to assure that the 1998 plan was not the "fruit of the poisonous tree." Had it done so, the court would have concluded readily that the 1998 plan was itself unconstitutional because it retained "vestiges" of its predecessor plans. In view of pending proceedings in this case – including a trial – the Court should provide clear guidance to the three-judge district court that it must satisfy itself that the "taint" of the 1992 race-based plan has been finally removed. This guidance also will greatly benefit other courts called upon to evaluate redistricting plans which replace plans held unconstitutional.

II. The District Court Should Have Placed on the State Defendants the Burden of Proving That the 1998 Plan Was Not Race-Based.

In its order allowing the congressional elections to proceed pursuant to the 1998 plan, the three-judge district court

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districts." (App. at 4a.) In this context, "cores" is the functional equivalent of "vestiges"; and protecting "cores" of racially gerrymandered congressional districts is no more to be tolerated than preserving the "vestiges" of racially segregated schools.

[16] Understandably the use of such euphemism heightens public cynicism about the purpose and value of elections. Moreover, in the present context to accept the logic of "incumbency considerations" would permit reenactment of the most flawed racially gerrymandered plan for the alleged purpose of protecting incumbents elected pursuant to that plan.

stated, "[b]ecause the Court cannot now say that race was the predominant factor in the drawing of District 12 in the 1998 congressional districting plan, the revised plan is not in violation of the United States Constitution." (App. at 1a.) Appellants have already pointed out that in dealing with a plan which replaces a racially gerrymandered plan, the standard should be that of *Arlington Heights* - whether the plan would have been adopted absent the racial motive - rather than whether "race was the predominant factor."[17]

However, even if the test is still to be whether a racial motive predominated, the State defendants - who committed the constitutional violations - should bear the burden to establish that race was *not* the predominant motive; and the burden should not have been placed on the plaintiffs to establish that race still predominated in drawing District 12. This conclusion is a logical corollary of the principle that "vestiges" of the unconstitutional plan should be eliminated. Thus, in comparable cases involving school desegregation, the burden was placed on the defendants to prove that they had eliminated the constitutional violation. Cf. *School Bd. of Richmond v. Baliles*, 829 F.2d at 1311; *Vaughan v. Board of Educ.*, 758 F.2d at 991.[18]

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[17] In *Wise v. Lipscomb*, 437 U.S. at 540, the Court stated, "The new legislative plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution." However, appellants do not interpret this statement to mean that when the new plan "is challenged," that challenge will be considered as if there had been no preceding violation. Not to consider the prior violations would conflict with the principle that "vestiges" of an unconstitutional plan should be eliminated and also would facilitate evasion of equal protection guarantees.

[18] Similarly, the burden of proof seems to have been placed on the prosecution to demonstrate that the "taint" arising out of an illegal arrest in violation of the Fourth Amendment had been eliminated prior to obtaining

The misallocation of burden of proof helped lead the court below to an erroneous result. It is especially important that this error not be repeated in future proceedings in this case or duplicated in other litigation which concerns the remedying of unconstitutional racial gerrymanders.

CONCLUSION

The three-judge district court erred in denying appellants their requested injunction against use of the 1998 redistricting plan in any congressional primary or election. Therefore, its order should be set aside and the Court should provide clear guidance to the court below as to its full scope of its responsibilities in reviewing the 1998 plan. This guidance also will help other courts avoid similar errors in future redistricting cases.

Respectfully submitted, this the 15th day of September, 1998.

ROBINSON O. EVERETT*

MARTIN B. McGEE

Attorneys for the Appellants

**Counsel of Record*

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a confession. *See Taylor v. Alabama*, 457 U.S. at 690; *Dunaway v. New York*, 442 U.S. at 216-19; *Brown v. Illinois*, 422 U.S. at 603-4.

APPENDIX

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ORDER OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, JUNE 22, 1998

[Caption omitted in printing]

This matter is before the Court on the Defendants' submission of a congressional districting plan for the 1998 congressional elections (the "1998 plan"). By Order dated April 21, 1998, this Court directed the North Carolina General Assembly to enact legislation revising the 1997 congressional districting plan and to submit copies to the Court. The General Assembly enacted House Bill 1394, Session Law 1998-2, redistricting the State of North Carolina's twelve congressional districts, and the Defendants timely submitted the 1998 plan to the Court. The Plaintiffs subsequently filed an opposition and objections to the 1998 plan, and the Defendants have responded to the Plaintiffs' objections. On June 8, 1998, the United States Department of Justice precleared the 1998 plan pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, and this Court must now decided whether the 1998 plan complies with the Equal Proteetion Clause of the United States Constitution.

Because the Court cannot now say that race was the predominant factor in the drawing of District 12 in the 1998 congressional districting plan, the revised plan is not in violation of the United States Constitution, and the 1998 congressional elections should proceed as scheduled in the Court's April 21 Order.

* * * *

In *Shaw v. Hunt,* the United States Supreme Court considered challenges to North Carolina's 1992 congressional

districting plan (the "1992 plan") and held that the Twelfth Congressional District ("District 12") in the 1992 plan was drawn with race as the predominant factor, that the districting plan was not narrowly tailored to serve a compelling state interest, and that the 1992 plan violated the Equal Protection Clause. 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) ("*Shaw I*"); 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) ("*Shaw II*").

After the North Carolina General Assembly redrew the State's congressional districting plan in 1997, the Plaintiffs in this action challenged the constitutionality of the 1997 plan in this Court. Specifically, the Plaintiffs argued that the Twelfth and First Congressional Districts were unconstitutional racial gerrymanders. Each party moved for summary judgment, and in an Order dated April 3, 1998, the Court granted summary judgment in favor of the Plaintiffs with respect to District 12. Like the Supreme Court in *Shaw*, this Court held that race was the predominant factor in the drawing of District 12 in the 1997 plan, and that the district was violative of Equal Protection. In its April 3 Order, the Court instructed the Defendants to submit a new plan in which race was not the predominant factor in the drawing of District 12.

The Court found that neither party could prevail as a matter of law with respect to District 1, and denied summary judgment as to that district. Neither this Court nor the Supreme Court in *Shaw* has made a legal ruling on the constitutionality of District 1 under the 1992, 1997, or 1998 congressional districting plans.

* * * *

In *Wise v. Lipscomb* the Supreme Court advised that "[w]hen a federal court declares an existing apportionment

scheme unconstitutional, it is . . . appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." 437 U.S. 535, 540, 98 S.Ct. 2493, 2497, 57 L.Ed.2d 411 (1978). In reevaluating a substitute district plan, the court must be cognizant that "a state's freedom of choice to devise a substitute for an apportionment plan found unconstitutional, either in whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause." *Id.* (quoting *Burns v. Richardson*, 384 U.S. 73, 85, 86 S.Ct. 1286, 1293, 16 L.Ed.2d 376 (1966)). Finally, as the Supreme Court has noted, because "federal court review of districting legislation represents a serious intrusion on the most vital of local functions," this Court must "exercise extraordinary caution in adjudicating" the issues now before it. *Miller v. Johnson*, 515 U.S. 900, 916, 115 S.Ct. 2475, 2488, 132 L.Ed.2d 762 (1995).

Because this Court held only that District 12 in the 1997 plan unconstitutionally used race as the predominant factor in drawing District 12, the Court is now limited to deciding whether race was the predominant factor in the redrawing of District 12 in the 1998 plan. In reviewing the General Assembly's 1998 plan, the Court now concludes that on the record now before us that race cannot be held to have been the predominant factor in redrawing District 12. In enacting the 1998 plan, the General Assembly aimed to specifically address this Court's concerns about District 12. Thus, the present showing supports the proposition that the primary goal of the legislature in drafting the new plan was "to eliminate the constitutional defects in District 12." Aff. of Gerry F. Cohen. The State also hoped to change as few districts as possible, to maintain the partisan balance of the State's congressional delegation, to keep incumbents in separate districts and

preserve the cores of those districts, and to reduce the division of counties and cities, especially where the Court found the divisions were based on racial lines. *Id.*

With the foregoing in mind, the General Assembly successfully addressed the concerns noted by the Court in its Memorandum Opinion for the purposes of the instant Order. Thus, the 1998 plan includes a Twelfth Congressional District with fewer counties, fewer divided counties, a more "regular" geographic shape, fewer divided towns, and higher dispersion and perimeter compactness measures. District 12 now contains five, rather than six, counties, and one of those counties is whole. District 12 no longer contains any part of the City of Greensboro or Guilford County. The 1998 plan no longer divides Thomasville, Salisbury, Spencer, or Statesville. The new plan also addresses the Court's concern that it not assign precincts on a racial basis. While the Court noted in its Memorandum Opinion that the 1997 plan excepted form District 12 many adjacent "voting precincts with less than 35 percent African-American population, but heavily Democratic voting registrations," the 1998 plan includes fourteen precincts in Mecklenburg County in which previous Democratic performance was sufficient to further the State's interest in maintaining the partisan balance within the congressional delegation. The General Assembly also added several Forsyth County precincts to smooth and regularize the District's boundaries. These changes resulted in a total African-American population in District 12 of 35 percent of the total population of the district, down from 46 percent under the 1997 plan.

* * * *

Based on the foregoing, the Court now accepts the 1998 plan as written. The 1998 congressional elections will thus proceed under this plan, as scheduled in this Court's April 21,

1998, Order. As noted above, neither this Court nor any other has made a legal ruling on the constitutionality of District 1. The 1998 plan is only approved with respect to the 1998 congressional elections, but the Court reserves jurisdiction with regard to the constitutionality of District 1 under this plan and as to District 12 should new evidence emerge. This matter should therefore proceed with discovery and trial accordingly. The parties are ordered to submit proposed discovery schedules to the Court on or before June 30, 1998.

SO ORDERED.

This 19th day of June, 1998.

SAM J. ERVIN, III
United States Circuit Judge

TERRENCE W. BOYLE
Chief United States District Judge

RICHARD L. VOORHEES
United States District Judge

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Martin Cromartie, *et al.*, the plaintiffs above-named, hereby appeal to the Supreme Court of the United States from the Order of the three-judge District Court dated June 19, 1998, approving the 1998 congressional redistricting plan for use in the 1998 congressional elections in accordance with the schedule provided in the Court's April 21, 1998 Order.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted, this the 17th day of July, 1998.

/s/ Robinson O. Everett

/s/ Martin B. McGee

Supreme Court, U.S.
FILED
DEC 2 1998
CLERK

No. 98-450

In the

Supreme Court of the United States

October Term, 1998

MARTIN CROMARTIE, *et al.*,

Appellants,

v.

JAMES B. HUNT, JR., *et al.*,

Appellees,

and

ALFRED SMALLWOOD, *et al.*,

Intervenor-appellees.

On Appeal from the United States District Court for the Eastern District of North Carolina

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM

MICHAEL F. EASLEY
North Carolina Attorney General

Edwin M. Speas, Jr., Chief Deputy Attorney General
Tiare B. Smiley,* Special Deputy Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
Telephone: (919) 716-6900

**Counsel of Record*

QUESTIONS PRESENTED

1. Does 28 U.S.C. § 1253 confer appellate jurisdiction to review a district court's interlocutory approval of an interim redistricting plan over the opposition of plaintiffs who did not seek to enjoin use of the interim plan?

2. Assuming the approval of an interim redistricting plan is the equivalent of a denial of temporary injunctive relief, does an actual case or controversy exist over the one-time use of such a plan after the fact of the election plaintiffs sought to enjoin?

3. Did the district court abuse its discretion by allowing the State's 1998 congressional elections to go forward under an interim redistricting plan where plaintiffs opposing the use of the interim plan failed to meet their burden of showing a likelihood of success on the merits and the existence of irreparable harm?

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No. 98-450

In the

Supreme Court of the United States

October Term, 1998

MARTIN CROMARTIE, *et al.*,

Appellants,

v.

JAMES B. HUNT, JR., *et al.*,

Appellees,

and

ALFRED SMALLWOOD, *et al.*,

Intervenor-appellees.

On Appeal from the United States District Court for the Eastern District of North Carolina

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM

Defendant-appellees, the Governor and other officials of the State of North Carolina, move the Court to dismiss the appeal by plaintiff-appellants, Martin Cromartie, *et al.*, from the Order of the United States District Court for the Eastern District of North Carolina, dated June 22, 1998, which allowed the State's 1998 congressional elections to proceed under an interim redistricting plan, on the grounds that appellants have failed to present an appealable or justiciable issue for review by

this Court or, in the alternative, to affirm the order on the grounds that appellants have failed to raise a substantial question not previously decided or meriting review by this Court.

STATEMENT OF THE CASE

This appeal is the fourth application to this Court this decade seeking review of North Carolina's congressional redistricting efforts. In *Shaw v. Reno*, 509 U.S. 630 (1993) (*Shaw I*)[1], this Court held that plaintiffs had stated an "analytically distinct claim" under the Equal Protection Clause "by alleging that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it [could] be understood only as an effort to segregate voters into separate voting districts because of their race and that the separation lacks sufficient justification." *Id.* at 652, 658. The case was remanded for trial. On appeal after trial, this Court in *Shaw v. Hunt*, 517 U.S. 899 (1996) (*Shaw II*)[2], struck down the 1992 plan holding that District 12 was drawn predominantly on the basis of race and did not satisfy strict scrutiny because it

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[1] The plaintiffs in *Shaw I* challenged Districts 1 and 12 in North Carolina's 1992 congressional redistricting plan ("the 1992 plan") as an unconstitutional racial gerrymander. Their claim was dismissed by a 2-1 vote of the district court. 509 U.S. at 638.

[2] The three-judge panel, with one judge dissenting, held that the 1992 plan "did classify voters by race, but that the classification survived strict scrutiny and therefore did not offend the Constitution." 517 U.S. at 901-02.

was not narrowly tailored.[3] *Id.* at 907, 918. The case was remanded for further proceedings.

Shortly after *Shaw II* was decided, the initial *Cromartie* plaintiffs filed this action alleging that District 1 of the 1992 plan was an unconstitutional racial gerrymander.[4] The case was stayed pending the remand proceedings in *Shaw*. In the meantime, the *Cromartie* plaintiffs joined the plaintiffs in *Shaw* and filed an amended complaint in that case challenging District 1 in the 1992 plan and sought to enjoin conduct of the 1996 elections under the 1992 plan. The *Shaw* court allowed the impending 1996 elections to proceed, but directed the State to submit a new plan by April 1, 1997, for use in future elections.

The North Carolina General Assembly enacted the 1997 congressional redistricting plan ("the 1997 plan") to cure the constitutional defects identified by this Court in *Shaw II*, and submitted it to the *Shaw* panel for approval. The *Shaw*/ *Cromartie* plaintiffs objected to the 1997 plan, but disclaimed any standing to challenge the plan because none of them lived within the boundaries of District 12. The *Shaw* court approved the 1997 plan on September 12, 1997, ruling the plan was in conformity with constitutional requirements, and authorized the

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[3] The Court held, however, that it lacked jurisdiction to address the constitutionality of District 1 because none of the plaintiffs resided in that district.

[4] The initial *Cromartie* plaintiffs, all residents of District 1, consisted of Martin Cromartie, Thomas Chandler Muse, and another plaintiff who has since dismissed her claim.

State to proceed with elections under it in 1998.[5] No appeal was taken from that order.

Shortly thereafter, the stay in this case was dissolved, and two of the original *Cromartie* plaintiffs (Cromartie and Muse) and four residents of District 12 filed an amended complaint on October 17, 1997, challenging Districts 1 and 12 in the 1997 plan.[6] The case then was assigned to a three-judge panel consisting of one judge who had served on the *Shaw* three-judge panel and two new judges. On January 30, 1998, four days before the close of the candidate filing period for the 1998 elections, the *Cromartie* plaintiffs moved for a preliminary and permanent injunction; they moved for summary judgment several days later. Brief oral arguments were heard by the *Cromartie* court on March 30, 1998; three days later, April 3, 1998, the court, with one judge dissenting, entered an order which granted the *Cromartie* plaintiffs' motion for summary judgment, declared District 12 in the 1997 plan unconstitutional, and permanently enjoined the State from conducting any elections under the 1997 plan.[7] The State noticed an appeal to this Court, which is now pending. *See*

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[5] Because the enactment of the 1997 plan substantially altered Districts 1 and 12, the court dismissed the *Shaw/Cromartie* plaintiffs' challenge to District 1 in the 1992 plan as moot.

[6] The four District 12 plaintiffs added to the complaint were R. O. Everett, J. H. Froelich, James Ronald Linville and Susan Hardaway. The complaint was amended again later to add District 1 residents Robert Weaver and Joel K. Bourne.

[7] The court denied summary judgment as to District 1.

Hunt v. Cromartie, No. 98-85.[8] Because the 1997 election was already in full swing, and the primaries were only a few weeks away, the State sought a stay of the injunction from the district court and this Court. Both applications were denied and the 1998 congressional primaries were not held with the State's other federal and state primary elections on May 5, 1998.

The district court allowed the State 30 days to redraw its congressional plan to correct the defects it had found in the 1997 plan. On May 21, 1998, the General Assembly, by bipartisan vote, enacted the 1998 interim congressional redistricting plan ("the 1998 interim plan") and submitted it to the court for approval.[9]

The *Cromartie* plaintiffs immediately filed their opposition and objections to the 1998 interim plan, asserting that it is an improper remedy because it does not eliminate all "vestiges" of the original constitutional violations.[10] The State responded to

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[8] Probable jurisdiction was noted on September 29, 1998. The State appellants' brief on the merits was filed with the Court on November 10, 1998; the *Cromartie* appellees' brief on the merits is due on December 8, 1998; and any reply brief is due December 29, 1998. Oral arguments are set for January 20, 1999.

[9] The plan was adopted by the General Assembly effective for the years 1998 and 2000, unless this Court reverses the district court decision holding the 1997 plan unconstitutional.

[10] In support of their objections, plaintiffs filed the affidavit of their counsel Martin B. McGee, attached to which were demographic fact sheets on six Forsyth County precincts and maps depicting demographic and registration data for Forsyth and Mecklenburg counties (two of the five counties included in new District 12) as well as a map showing side by side

plaintiffs' objections both on the legal merits and factually.[11] On June 22, 1998, the district court entered an order tentatively approving the 1998 plan on an interim basis. Jurisdictional Statement ("JS") at 1a-5a. Based on the materials presented by the parties, the district court concluded that race did not predominate in redrawing District 12 and that the primary goal of the legislature in drawing the 1998 interim plan was to eliminate the specific concerns with the 1997 plan which had been identified by the court. *Id.* at 3a.[12]

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the 1992, 1997 and 1998 plans.

[11] In support of the 1998 interim plan, the State filed the affidavits of the principal architects of the remedial plan: Senator Roy A. Cooper, III, and Representative W. Edwin McMahan, chairmen of the State Senate and House redistricting committees, and Gerry Cohen, the Director of the General Assembly's Bill Drafting Division. These affidavits explained the goals guiding the State's redistricting efforts, which included maintaining the six-Democrat, six-Republican balance of the delegation, keeping incumbents in separate districts and preserving the cores of their districts. The overriding goal, however, was to eliminate the constitutional defects identified by the *Cromartie* district court when it found District 12 in the 1997 plan unconstitutional. The affidavits describe in detail how line-by-line each of the concerns expressed in the court's opinion was addressed. These affidavits also included mathematical measures of compactness and other demographic data analyzing the improvements and revisions made to the plan. The court was also provided a copy of the State's § 5 preclearance submission, which comprises a complete legislative history of the plan's enactment, including transcripts of the public hearing, committee meetings and floor debates.

[12] Specifically, the court found that the 1998 interim plan reduced the division of counties and cities and reassigned heavily democratic precincts where the court had found the divisions and assignments in the 1997 plan were based on racial lines. It also found the shape of District 12 was made more regular, the number of counties encompassed in the district was reduced and the total African-American population in the district was

Because the revisions to District 12 "successfully addressed" the concerns the court had identified when it entered a permanent injunction against the 1997 plan, and "the revised plan is not in violation of the United States Constitution," the court authorized the State to proceed with elections under the 1998 interim plan.[13] *Id.* at 1a. However, the plan was approved only for the 1998 elections and the court reserved "jurisdiction with regard to the constitutionality of District 1 under this plan and as to District 12 should new evidence emerge." *Id.* at 5a. The parties were directed to prepare for trial.[14] The Cromartie plaintiffs gave notice of appeal from this order and filed the instant Jurisdictional Statement. No stay was sought by the plaintiffs to halt the 1998 congressional primaries or general election.

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reduced to 35 percent. JS at 4a.

[13] After enjoining the May 5, 1998 congressional primaries, the court entered an order on April 21, 1998, establishing a truncated election schedule to begin no later than July 6, 1998. The schedule provided for a candidate filing period from July 6 to July 20; a shortened absentee balloting period; and stand-alone congressional primary elections on September 15 - when no other state or federal elections were being held. Because of the proximity of the November 3, 1998, general election, the court's election schedule did not provide for primary run-offs (second-primaries) otherwise provided by State law.

[14] After this Court noted probable jurisdiction of the State's appeal of the order permanently enjoining elections under the 1997 plan, the parties jointly moved the district court to stay discovery and all further proceedings in the case pending this Court's decision. A stay was entered on October 19, 1998.

ARGUMENT

Plaintiffs' appeal of the lower court's interlocutory order approving the 1998 interim plan for purposes of conducting the State's 1998 congressional elections is premature and presents no appealable or justiciable issue for review; at the very least, it fails to raise a substantial question not previously decided or meriting review by this Court.

I. PLAINTIFFS' APPEAL DOES NOT PRESENT AN APPEALABLE OR JUSTICIABLE ISSUE.

Plaintiffs' appeal of the district court's interlocutory order allowing the State's 1998 elections to proceed may be dismissed on two alternative grounds: first, there is no appellate jurisdiction pursuant to 28 U.S.C. § 1253, which limits review to three-judge court orders granting or denying injunctive relief; and second, the appeal does not present a justiciable issue under Article III of the Constitution which requires an actual case or controversy.

A. THE DISTRICT COURT'S ORDER IS NOT APPEALABLE.

At the outset, there is nothing in the record to support plaintiffs' claim that they are appealing from the denial of a temporary or permanent injunction against the 1998 interim plan. When the General Assembly enacted a new redistricting plan and submitted it to the Court for approval, plaintiffs simply "informed" the district court of their opposition and objections to the revised 1998 redistricting plan and asked the

court to "disapprove" or "reject" the plan and proceed to draw one of its own.[15] They never moved for a preliminary injunction.

The statute which provides for appellate jurisdiction from decisions by three-judge courts, 28 U.S.C. § 1253, allows direct appeal to this Court only from an order granting or denying preliminary or permanent injunctive relief and must be strictly construed. *See In re Slagle*, 504 U.S. 952 (1992) (White, J., concurring in order dismissing certificate) (Court construes jurisdiction over three-judge decisions narrowly); *Mitchell v. Donovan*, 398 U.S. 427 (1970) (three-judge court legislation, 28 U.S.C. § 1253, is not to be construed liberally). In this case, there is no appellate jurisdiction for review of the district court's interlocutory order which did no more than tentatively approve the 1998 interim plan and allow elections to proceed. Because, plaintiffs did not request injunctive relief, the court did not deny such relief, and the appeal can be dismissed on this ground alone.

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[15] Plaintiffs submitted one alternative plan to the court and also endorsed a plan filed by an independent group.

B. THERE IS NO ACTUAL CASE OR CONTROVERSY.

Appellate jurisdiction exists in this case only if the court's order rejecting plaintiffs' opposition and objections to the 1998 interim plan is treated as the functional equivalent of a denial of preliminary injunctive relief.[16] Assuming, however, that the court's rejection of plaintiffs' opposition to the plan is appealable, the district court approved the interim plan only for the 1998 congressional elections. JS at 5a. The elections already have been held under the plan so there remains no case or controversy over enjoining the 1998 elections.

It is a fundamental principle that under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies. *Raines v. Byrd*, 521 U.S. 811, ___, 117 S. Ct. 2312, 2317 (1997); *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). To invoke the jurisdiction of the court, a litigant must show an actual injury that is "likely to be redressed by" a favorable judicial decision. *Allen v. Wright*, 468 U.S. 737, 751 (1984). This case or controversy requirement must exist at all stages of federal proceedings, trial and appellate, and not simply at the date the action is initiated. *Deakins*, 484 U.S. at 199. A ruling that will not provide any relief to the prevailing party ignores the duty of the courts "to

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[16] Plaintiffs cannot establish appellate jurisdiction by characterizing the court's interlocutory order as a denial of a permanent injunction. Under 28 U.S.C. § 1253, direct appeal from interlocutory orders are limited to granting or denying preliminary injunctions; that section does not authorize direct appeal from interlocutory orders denying permanent injunctions. *Goldstein v. Cox*, 396 U.S. 471, 478 (1970).

decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Local No. 8-6 v. Missouri*, 361 U.S. 363, 367 (1960) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

In the instant case, enjoining the 1998 election is a moot question and a favorable judicial decision cannot provide the temporary relief sought. As a practical matter, moreover, there is no reason for this Court to rebalance - after the fact of the 1998 elections - the equities regarding the grant or denial of preliminary injunctive relief; especially in a case where the lower court's ruling does not rest on any legal issue or conclusion that will not be fully re-examined in the pending trial proceedings. The order appealed from is interlocutory in nature and the plaintiffs will have a full opportunity to challenge the 1998 interim plan and to present their factual and legal claims on a complete record. For this reason, plaintiffs have failed to present a justiciable issue for review and their premature appeal should be dismissed.

II. PLAINTIFFS' APPEAL OF THE COURT'S INTERLOCUTORY ORDER DOES NOT PRESENT A SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED OR MERITING REVIEW.

Plaintiffs' appeal from the district court's interlocutory order allowing elections to go forward under the 1998 interim plan does not present a substantial question not previously decided by this Court in other, similar redistricting cases. This

makes further argument or review unnecessary and the district court's order should be affirmed by this Court. The order is appealable only if it is treated as the functional equivalent of the denial of a preliminary injunction.[17] So treated, unquestionably the court did not abuse its discretion by denying plaintiffs' request. The lower court's decision correctly applied existing precedent when it appr ed the 1998 interim plan. Plaintiffs are asking this Court to ond-guess the lower court's balancing of the equities, which, in this case, clearly favored holding an election under the interim plan.

A. Standards For Granting Or Denying A Preliminary Injunction.

Under the circumstances of this case, plaintiffs' interlocutory appeal of the denial of a preliminary injunction cannot reach the question of the constitutionality of the 1998 interim plan, a question still to be addressed below by a trial on the merits in the event the 1997 plan is not upheld. *See Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316-17 (1940) (court committed serious error ruling on the constitutionality of a state statute upon a motion for temporary injunction). Instead, the district court's order must be reviewed under preliminary injunction standards. The grant or denial of a preliminary injunction falls within the sound discretion of the

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[17] It is clear, based on its retention of jurisdiction, that the court did not intend its order to be a final decision on the merits. A decision on the merits, and hence a decision on the constitutionality of Districts 1 and 12 as well as the issuance of a permanent injunction, has been left for future proceedings by the lower court on a complete record. *See* JS at 5a.

district court, and appellate review by this Court of preliminary injunction determinations is solely for abuse of discretion. *See, e.g., Brown v. Chote*, 411 U.S. 452, 457 (1973) (In reviewing preliminary injunction request, "this Court may only consider whether issuance of the injunction constituted an abuse of discretion."); *United States v. Corrick*, 298 U.S. 435 (1936) (same). *See also Mayo*, 309 U.S. at 317 (1940) (issue presented on appeal from an interlocutory order is restricted to the question whether "the court [has] abused its discretion in granting or refusing an injunction").

The award of a preliminary injunction enjoining a state's redistricting plan is an extraordinary remedy, as evidenced by the federal statute requiring the convening of a three-judge court in cases such as this. The federal statute requiring the convening of a three-judge court was intended to ensure that a state enactment "not be suspended by injunction except upon a clear and persuasive showing of unconstitutionality and irreparable injury." *Mayo*, 309 U.S. at 318-19. In determining whether the far-reaching power of a preliminary injunction is clearly demanded, the Court must balance two relevant factors: (1) the plaintiffs' possibility of success on the merits, and (2) the possibility of irreparable injury absent interlocutory relief. *Brown*, 411 U.S. at 456. *See also Withrow v. Larkin*, 421 U.S. 35, 43, 45 (1975) (question for the district court was whether the challenge to the constitutionality of the "statute has a high likelihood of success" and enforcement "would inflict irreparable damages upon the complainants"); *Mayo*, 309 U.S. at 316 (question before the Court "was whether the showing made raised serious questions, under the federal Constitution"

and "disclosed that enforcement of the act . . . would inflict irreparable damages upon the complainants").

In the present appeal, one question the plaintiffs ask the Court to address is whether the district court should have placed the burden on the State to prove that race did not predominate in the drawing of the 1998 interim plan. This framing of the issues is misdirected for two reasons. First, based on the explicit language of the district court's order, no burden was assigned to either party to satisfy the predominance test, although the factual findings and legal conclusions in the court's order obviously are dependent on the plenary evidence presented by the State. Second, to the extent plaintiffs' objection to the plan is the functional equivalent of a preliminary injunction request, the burden of establishing the likelihood of irreparable harm and of success on the merits rested with the plaintiffs. *Mayo*, 309 U.S. at 316.

B. The District Court Correctly Applied Established Redistricting Precedent In Approving The 1998 Interim Plan.

The issues plaintiffs seek to raise in this interlocutory appeal previously have been decided by this Court in similar equal protection redistricting cases. For this reason, the district court's decision, which correctly applied this Court's precedents, should be affirmed. Stated in the context of the denial of a preliminary injunction, plaintiffs failed to meet their burden to show a likelihood of success on the merits and the district court did not abuse its discretion by approving the 1998 plan on an interim basis until further proceedings can be held

on a complete record. *See Withrow*, 421 U.S. at 46 (abuse of discretion to issue preliminary injunction when it is unlikely the party would ultimately prevail on the merits).

The legal principles governing the proper role of the courts in reviewing remedial redistricting plans are well established and were followed by the lower court. *See* JS at 2a-3a. This Court has long adhered to the principle that "redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978). *See also Lawyer v. Department of Justice*, 421 U.S. 567, ___, 117 S. Ct. 2186, 2193 (1997) (when a state takes the opportunity "to make its own redistricting decisions," "the discretion of the federal court is limited except to the extent that the plan itself runs afoul of federal law.") The role of the courts in this inherently legislative process is simply to ensure that, if there is a constitutional violation, that violation is corrected; otherwise, the court must defer to a state's legislative and political judgment. A "State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause." *Wise*, 437 U.S. at 540 (quoting *Burns v. Richardson*, 384 U.S. 73, 85 (1966)). The court's role is limited to determining "whether the proffered remedial plan is legally unacceptable because it violates anew constitutional or statutory voting rights - that is, whether it fails to meet the same standards applicable to an original challenge of a legislative plan in place." *Upham v. Seamon*, 456 U.S. 37, 42 (1982).

Plaintiffs, in advancing a "vestiges" of *de jure* segregation theory, would add an entirely new factor to the redistricting calculus. They would have this Court hold that a newly enacted redistricting plan which meets the demands of the Equal Protection Clause nevertheless remains unconstitutional if it evolved from or is in anyway related to a prior redistricting plan. According to plaintiffs' theory, a state formulating a new redistricting plan would have to start from scratch, since a plan bearing any resemblance to a previous unconstitutional plan would invariable contain "vestiges" of the invalid plan. This concept has not previously been adopted by this Court in its redistricting jurisprudence and conflicts squarely with the strong obligation of the courts to respect legislative policies and choices.

Plaintiffs' "vestiges" theory also directly contravenes the directions this Court has given to lower courts forced to take on the task of drawing remedial redistricting plans. If the district court had drawn the 1998 plan itself, it would have been required to do precisely what plaintiffs contend the State cannot do - adhere as closely as possible to the legislative choices not affected by the constitutional violation. This Court has repeatedly taken lower courts to task for imposing remedial plans which rejected or ignored valid legislative choices reflected in previous plans stricken as unconstitutional. *See, e.g., White v. Weiser*, 412 U.S. 783, 796 (1973) (district court erred when it chose alternative Plan C rather than Plan B, which was virtually identical to stricken plan except for changes necessary to cure constitutional violations, because it most closely resembled state's preference); *Upham*, 456 U.S.

at 43 (court may make only those changes *necessary* to cure defect and is not free "to disregard the political program" of the state).

Indeed, plaintiffs' novel "vestiges" theory has been implicitly rejected by this Court in a similar racial gerrymandering context. In *Lawyer*, Florida's new Senate District 21 was approved even though it was based on and retains the core of the prior unconstitutional district, including a substantial minority population. 117 S. Ct. at 2191-92, 2195. Similarly, in Texas, on remand from *Bush v. Vera*, 517 U.S. 952 (1996), when the district court imposed its own interim remedy, the plan merely modified the three congressional districts that had been determined to be racial gerrymanders and other adjoining districts only so much as to cure the defects of the gerrymandered districts. *See Vera v. Bush*, 933 F. Supp. 1341 (S.D. Tex. 1996).[18]

At this interlocutory stage of the proceedings, plaintiffs ask this Court to overturn its longstanding jurisprudence governing the review of remedial redistricting plans and substitute in its place principles developed to dismantle unlawful dual school systems and convert them to unitary systems. *See, e.g., Board of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 498 U.S. 237, 250 (1991) These doctrines are irrelevant to the *Shaw/Miller* predominance inquiry. Moreover, the district court was bound

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[18] When the Texas legislature failed to enact a new redistricting plan, the same court ordered that its interim plan remain in place as the permanent remedy. *Vera v. Bush*, 980 F. Supp. 251 (S.D. Tex. 1997).

by this Court's admonition that when a federal court is called upon to judge the constitutionality of a state's redistricting legislation in the face of a racial gerrymandering challenge, the good faith of a state legislature must be presumed. *Miller v. Johnson*, 515 U.S. 900, 915 (1995).

The district court's conclusion that race was not the predominant factor in redrawing District 12 in the 1998 interim plan, *see* JS at 3a, is fully supported by the State's evidentiary showing in support of the plan. The State fully remedied the alleged constitutional violation by specifically addressing each of the concerns noted by the court when it struck down the 1997 plan. *See* JS at 4a. No more can be required. Adoption of plaintiffs' "vestiges" theory necessarily would have required the district court to reject established redistricting principles. Hence, it was not an abuse of discretion by the district court to approve the conduct of elections under the 1998 interim plan. Plaintiffs' reliance on inapposite school segregation case law failed to establish a likelihood of success on the merits which could have justified temporarily enjoining elections under the 1998 interim plan.

C. The District Court Properly Balanced The Equities By Allowing The 1998 Elections To Proceed.

Although not specifically addressed by the district court in its order approving the conduct of elections under the 1998 interim plan, the lack of irreparable harm to plaintiffs is, as a matter of law, an insurmountable barrier to their claim for injunctive relief. Harm is only irreparable when it cannot be

redressed by a legal or an equitable remedy following a trial. *See, e.g., Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) ("the Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies."); 11A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE CIVIL 2D § 2948.1 at 144,149 (2d ed. 1995) ("Only when the threatened harm would impair the court's ability to grant an effective remedy is there really a need for preliminary relief.") The district court has full remedial powers to fashion relief in the election context if, after a full hearing, it concludes the 1998 interim plan violates the constitution. In appropriate circumstances, relief may be given by means of a special election, *Ketchum v. City Council of Chicago, Ill.*, 630 F. Supp. 551, 565 (N.D. Ill. 1985), or by deferring relief to the next election cycle. *Republican Party of Va. v. Wilder*, 774 F. Supp. 400, 407 (W.D. Va. 1991). *See also Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 981 F. Supp. 751, 763 (E.D.N.Y. 1997) (preliminary injunction to stop election denied because any injury plaintiff would suffer could be remedied after trial).

The irreparable harm to the defendants and the public interest in this case weighed heavily against the grant of injunctive relief to the plaintiffs. At the time plaintiffs' objection was filed, May 27, 1998, the district court was faced with an impending drop-dead date of July 6, 1998, by which time a redistricting plan had to be in place if North Carolina was going to elect congressional representatives in the 1998

general elections.[19] Faced with the prospect of not holding the State's 1998 congressional elections on time, the court correctly dismissed the plaintiffs' opposition to the 1998 interim plan and ordered the elections to go forward under the plan duly enacted by the State's legislature.

It is well settled that allowing elections to proceed in an orderly and timely manner is an important public interest. *See, e.g., Leblanc-Sternberg v. Fletcher*, 763 F. Supp. 1246, 1249 (S.D. N.Y. 1991) (any scheduled election "is, without question, in the public interest.") Allowing elections to proceed in an orderly and timely manner is so important an interest of the public that courts often allow elections to proceed even under plans which have already been held unconstitutional or which are otherwise invalid. *See, e.g., Cosner v. Dalton*, 522 F. Supp. 350, 363 (E.D. Va. 1981) ("Certification of candidates, ballot preparation, and a host of other election mechanics must be undertaken promptly if the existing schedule is to be followed."); *see also French v. Boner*, 771 F. Supp. 896, 902 n.8 (M.D. Tenn. 1991) (collecting cases where courts have withheld immediate injunctive or other equitable relief that would affect an impending election). This Court has cautioned the district courts in awarding or withholding relief in redistricting cases to consider the proximity of the forthcoming election and to "endeavor to avoid a disruption of the election process which might result from requiring precipitate changes

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[19] Federal law, 2 U.S.C. § 7, requires all the states' elections for representatives to Congress to be held the Tuesday after the first Monday in November in even numbered years. In 1998, election day was November 3, 1998.

that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). The lack of irreparable harm to these plaintiffs and the urgent need to put a redistricting plan into place fully supports the district court's decision to reject plaintiffs' opposition to holding elections under the 1998 interim plan - a plan the court tentatively had approved as constitutional.

The questions before this Court in this appeal are not - as posited by plaintiffs - whether the 1998 interim plan is a constitutional remedy and which party bears the burden of establishing the adequacy of a remedial redistricting plan, but whether the district court abused its discretion by denying plaintiffs' objections and ordering the State to conduct the 1998 elections under a redistricting plan approved by the court on an interim basis. Plaintiffs failed to make a showing of irreparable injury or a likelihood of success on the merits which requires this Court to second-guess the district court's balancing of these factors. The circumstances of this case favored the entry of an order allowing the State to conduct its 1998 congressional elections and the district court's interlocutory denial of temporary relief to the plaintiffs by rejecting their opposition and objections to the interim plan must be affirmed.

CONCLUSION

For the foregoing reasons, this Court should dismiss the appeal or, in the alternative, summarily affirm the decision of the court below.

Respectfully submitted,

MICHAEL F. EASLEY
North Carolina Attorney General

Edwin M. Speas, Jr.
Chief Deputy Attorney General

Tiare B. Smiley*
Special Deputy Attorney General

December 2, 1998

*Counsel of Record

No. 98-450

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IN THE

Supreme Court of the United States

OCTOBER TERM 1998

MARTIN CROMARTIE, *et al.*,

Appellants,

v.

JAMES B. HUNT, JR., *et al.*,

Appellees,

and

ALFRED SMALLWOOD, *et al.*,

Appellee-Intervenors.

On Appeal from the United States District Court
Eastern District of North Carolina

MOTION TO AFFIRM OR, IN THE ALTERNATIVE, TO DISMISS, OF APPELLEE-INTERVENORS

ELAINE R. JONES
Director-Counsel
THEODORE M. SHAW
NORMAN J. CHACHKIN
JACQUELINE A. BERRIEN
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
99 Hudson Street, Suite 1600
New York, New York 10013
(212) 219-1900

ADAM STEIN
FERGUSON, STEIN, WALLAS,
ADKINS GRESHAM &
SUMTER, P.A.
312 West Franklin Street
Chapel Hill, NC 27516
(919) 933-5300

TODD A. COX*
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
1444 Eye Street, NW
10th Floor
Washington, DC 20005
(202) 682-1300

**Counsel of Record*

Attorneys for Appellee-Intervenors

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. In as much as Appellants did not raise the issue before the three-judge district court below, is Appellants' claim that the court should have placed on the State the burden of proving that race did not predominate in the creation of the 1998 remedial reapportionment plan, which the legislature enacted to cure the constitutional violation found by the district court, in an earlier plan, properly before this Court?

2. Assuming that claim is properly before this Court, did the district court err by placing on the plaintiffs the burden of proving that race predominated in the creation of the remedial apportionment plan enacted by the legislature to cure the constitutional violation found by the three-judge district court in the 1997 congressional reapportionment plan?

3. Without regard to the burden of proof, did the district court err in concluding that the 1998 remedial plan -- enacted by the North Carolina General Assembly to cure the specific constitutional violation that the court found to exist in North Carolina's 1997 congressional reapportionment plan -- was constitutional?

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MOTION TO AFFIRM OR, IN THE ALTERNATIVE, TO DISMISS, OF APPELLEE-INTERVENORS

Pursuant to Rule 18.6 of the Rules of the Supreme Court of the United States, Appellee-Intervenors Alfred Smallwood, David Moore, William M. Hodges, Robert L. Davis, Jr., Jan Valder, Barney Offerman, Virginia Newell, Charles Lambeth and George Simkins ("Smallwood Appellees" or "Appellee-Intervenors")[1] move that this Court summarily affirm the order sought to be reviewed[2] or, in the alternative, dismiss the appeal on the ground that the questions raised by the appeal are so insubstantial as to require no further argument. The order on appeal is based on well-settled law established by this Court, and there is no conflict which requires this Court's resolution.

STATEMENT OF FACTS

This is an appeal of the Order of the three-judge United States District Court for the Eastern District of North Carolina, entered June 22, 1998, in *Cromartie v. Hunt*, approving North Carolina's 1998 interim congressional reapportionment plan, 1998 N.C. Sess. Laws, Ch. 2 ("1998 Interim Remedial Plan"), as a remedy for the specific constitutional violations it found to exist in the State's 1997 plan, as set forth in its April 3, 1998 Order and April 14, 1998 decision. The April Order and decision are unreported and appear at the Appendix to the Jurisdictional Statement on Behalf of the State of North Carolina in *Hunt v. Cromartie*, No. 98-85 ("NC. J.S. App.") at

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[1]Smallwood Appellees were granted intervention as party-defendants by the court below on June 20, 1998, two days prior to the entry of the Order from which this appeal is sought to be prosecuted. They are, accordingly, proper Appellees in this Court. S. Ct. R. 18.2.

[2]The Order of the three-judge United States District Court for the Eastern District of North Carolina, dated June 22, 1998, is unreported and appears in the Appendix to *Cromartie v. Hunt* Appellants' Jurisdictional Statement ("Appellants J.S. App.") at 1a.

45a and 1a, respectively.[3] The April 1998 Order is the subject of a separate appeal currently pending before this Court, *Hunt v. Cromartie*, No. 98-85.

On July 3, 1996, following the ruling of this Court in *Shaw v. Hunt*, 517 U.S. 899 (1996), three residents of Tarboro, North Carolina, who are among the Appellants herein, filed the complaint in this action, *Cromartie v. Hunt*, challenging District 1 of North Carolina's 1992 congressional apportionment plan on the ground that it violated their equal protection rights because race predominated in the drawing of the district. On July 11, 1996, the members of the Smallwood Appellees group (three voters from the First District and six voters from the Twelfth District), sought to intervene in the *Cromartie* suit as defendants.[4]

A stay of the *Cromartie* litigation was entered pending completion of the remand proceedings in *Shaw v. Hunt*. On July 9, 1996 the same Tarboro residents who initiated the *Cromartie* suit joined with the original plaintiffs in *Shaw* in filing an Amended Complaint in *Shaw*, raising a similar challenge to, and asserting the same claims against the First Congressional District as they raised in *Cromartie*. The *Shaw* case was dismissed by the three-judge court on September 12, 1997, after that court approved the 1997 Remedial Plan that had been enacted by the legislature. The *Cromartie* three-judge court lifted its stay of proceedings on October 17, 1997. On the same

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[3] A complete recitation of the relevant facts may be found in the Statement of the Case in the Brief of Appellant-Intervenors filed in *Hunt v. Cromartie*, No. 98-85.

[4] The Smallwood Appellees participated fully as intervenors in *Shaw v. Hunt* in the trial court and in this Court, including in the remedial proceedings which resulted in the approval by the *Shaw* court of the 1997 Remedial Plan.

day, two of the three original plaintiffs, along with four residents of the redrawn District 12, filed an Amended Complaint in the *Cromartie* action, challenging the 1997 Remedial Plan as a violation of the Equal Protection Clause and still seeking a declaration that District 1 in the 1992 Plan is unconstitutional. Within the time allowed for answering that amended complaint, the Smallwood Appellees filed a renewed motion to intervene as defendants.

On March 31, 1998, the court below heard arguments on cross-motions for summary judgment and on the *Cromartie* plaintiffs' request for preliminary injunction. On April 3, 1998, that three-judge United States District Court for the Eastern District of North Carolina issued an order granting summary judgment to plaintiffs, declaring North Carolina's Twelfth Congressional District unconstitutional, permanently enjoining elections under the 1997 Remedial Plan, and ordering the State of North Carolina to submit a schedule for the General Assembly to adopt a new redistricting plan and to hold elections under that plan. NC. J.S. App. at 45a. The district court issued its judgment on April 6, 1998. NC. J.S. App. at 49a.

The State moved for a stay of the injunction pending appeal. The district court denied this motion. The State then filed an application with this Court for a stay pending appeal, and the Smallwood Appellees filed an *amicus curiae* memorandum in this Court in support of the application. This Court denied the request for a stay on April 13, 1998. On April 14, 1998, the district court issued an opinion explaining its April 3, 1998 order.[5]

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[5]On May 26, 1998, with their two prior unopposed intervention motions still pending, the Smallwood Appellees filed a third motion to intervene as defendants in the case. On June 20, 1998, after the deadline for filing a timely notice of appeal of the district court's April 3, 1998 order and April 6, 1998 judgment, the district court ruled that the Smallwood

The district court directed the General Assembly to redraw the State congressional reapportionment plan within thirty days to remedy the violations found by the court in the 1997 Remedial Plan. On May 21, 1998, the General Assembly enacted the 1998 Interim Remedial Plan, and subsequently submitted it to the district court for approval together with documentary evidence describing the legislature's goals and method of producing the plan. Plaintiff-appellants filed an opposition and objections to the 1998 Interim Remedial Plan with the court and the State filed a response. Plaintiff-appellants did not request a court hearing on the plan. Pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, the Department of Justice precleared the 1998 Interim Plan on June 8, 1998.

On June 22, 1998, the district court entered an order tentatively approving the 1998 Interim Remedial Plan and authorizing the State to proceed with the rescheduled 1998 elections under that plan. Appellants J.S. App. at 1a. The district court noted its duty under this Court's precedents to afford the State the first opportunity to cure the constitutional violation found by the court and acknowledged the limits this Court has placed on district courts in evaluating remedial reapportionment plans. Appellants J.S. App. at 3a. Accordingly, the district court determined that "[b]ecause [it] held only that District 12 in the 1997 plan unconstitutionally used race as the predominant factor in drawing District 12, the

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Appellees were entitled to intervene as of right in this action. As the delay in granting the motions to intervene prevented them from fully participating as parties in the district court and prevented them from being able to exercise their right to appeal, the Smallwood Appellees filed in this Court on October 2, 1998 a motion to intervene as Appellants in *Hunt v. Cromartie*, No. 98-85. This Court granted the motion on October 19, 1998. Appellants filed briefs on the merits in No. 98-85 on November 10, 1998.

[c]ourt is now limited to deciding whether race was the predominant factor in the redrawing of District 12 in the 1998 plan." *Id.* The district court found that, in enacting the 1998 Interim Remedial Plan, the General Assembly sought to "specifically address [the district court's] concerns about District 12," *id.*, while "hop[ing] to change as few districts as possible, to maintain the partisan balance of the State's congressional delegation, to keep incumbents in separate districts and preserve the cores of those districts, and to reduce the division of counties and cities, especially where the [district court] found the divisions were based on racial lines." *Id.* at 3a-4a.

The district court concluded that "the General Assembly successfully addressed the concerns noted by the [c]ourt in its Memorandum Opinion for the purposes of the instant Order," *id.* at 4a, and, "[t]hus, the 1998 plan includes a Twelfth Congressional District with fewer counties, fewer divided counties, a more 'regular' geographic shape, fewer divided towns, and higher dispersion and perimeter compactness measures." *Id.* The district court stated that "from the record now before [it]," *id.* at 3a, "race cannot be held to have been the predominant factor in redrawing District 12." *Id.* Referring to its earlier April 3, 1998 Order and April 14, 1998 decision, the district court noted that it was not ruling on the constitutionality of the revised District 1, and it directed the parties to proceed with discovery and trial accordingly. *Id.* at 5a. The district court specifically "reserve[d] jurisdiction" to reconsider its ruling regarding the constitutionality of District 12 of the 1998 Interim Remedial Plan "should new evidence emerge." *Id.*

SUMMARY OF ARGUMENT

In approving the 1998 North Carolina Congressional Redistricting Plan ("1998 Interim Remedial Plan") as a remedy for the constitutional violation it found in the 1997 plan, the court below acted in accord with this Court's long-standing,

well-settled precedents. Its decision was not clearly erroneous and should be affirmed, or in the alternative, this appeal should be dismissed.

First, Appellants argue that the district court erred in placing on them the burden of proving that race predominated in the creation of 1998 Interim Remedial Plan. However, despite raising a number of objections to the plan before the court below, Appellants failed to raise before the district court the issue of which party should bear the burden of proof at the remedial stage and, indeed, assumed the burden of proving that race predominated in the creation of the plan. As Appellants failed to raise the issue of what party should bear the burden of proof and neglected to object to the district court's assessment of burdens, the issue is not properly before this Court.

Nevertheless, even if Appellants have preserved this claim, it is insubstantial. It is well-settled that, in cases such as this, where plaintiffs challenge the constitutionality of a districting plan under the Fourteenth Amendment jurisprudence established by this Court in *Shaw v. Reno*, 509 U.S. 630 (1993) and *Miller v. Johnson*, 515 U.S. 900 (1995), the plaintiff bears the burden of proving that race predominated in the redistricting process. Moreover, consistent with this Court's precedents, this burden does not shift during the remedial phase of a challenge brought under the *Shaw* regime. Appellants offer no principled reasoning for abandoning this Court's holdings regarding burdens of proof in *Shaw* cases; instead they argue that shifting the burden would be consistent with the manner in which burdens are allocated in *de jure* school segregation cases. However, this analogy is tenuous, as school desegregation cases arise in a unique context that contrasts with the circumstances that attend redistricting cases and challenges brought under *Shaw* and its progeny. Since Appellants' theories conflict with this Court's regime for allocating burdens of proof in Fourteenth Amendment challenges such as this case, and

because Appellants demonstrate no meaningful rationale for altering that structure, Appellants' claim is insubstantial.

Second, Appellants cannot show that the court below erred in holding that race was not the predominant factor in the creation of the new Twelfth Congressional District in the 1998 Interim Remedial Plan. Appellants argue that the 1998 Interim Remedial Plan must be declared unconstitutional because it was the "fruit of the poisonous tree" of the 1992 and 1997 North Carolina reapportionment plans. Appellants contend that, in remedying the found *Shaw* violation, the State was required to abandon every feature of the challenged plan and construct a new plan without regard to its traditional districting concerns, including maintaining partisan balances and protecting incumbents. Appellants' theory is fundamentally at odds with this Court's precedents, finding no support in *Shaw* or its progeny or in the case law defining how courts evaluate remedial redistricting plans. According to these precedents, to the extent that the 1998 Interim Remedial Plan did not violate any federal or state constitutional or statutory requirements, the district court was bound to approve the plan. Appellants cannot show that this decision was clearly erroneous.

ARGUMENT

I. Appellants' Burden of Proof Argument does not warrant this Court's Review

A. Appellants failed to raise their burden of proof claim before the three-judge district court and have, therefore, waived it

Appellants claim that the State "should bear the burden to establish that race was *not* the predominant motive; and the burden should not have been placed on the plaintiffs to establish that race still predominated in drawing District 12." Appellants' Jurisdictional Statement ("Appellants J.S.") at 16 (emphasis in the original). Appellants' jurisdictional statement details all of

their objections to the 1998 Interim Remedial Plan that were presented to the court below. Appellants J.S. at 5, 11-15. However, Appellants never raised before the district court the issue of which party should bear the burden of proof at the remedial stage. In fact, Appellants assumed the burden of proving that race predominated in the creation of the plan, making arguments, similar to the ones raised here, that the State failed to remove from the plan the "vestiges" of the prior discrimination and that the plan is the "fruit of the poisonous tree" of the 1992 Plan and the 1997 Remedial Plan. Significantly, Appellants did not bring to the attention of the court below, for example by filing a motion pursuant to Fed. R. Civ. P. 59 to alter or amend the judgment, their contention that the burden of proof had been misallocated. Since Appellants failed to raise the issue of what party should bear the burden of proof and neglected to object to the district court's assessment of burdens, the issue is not properly before this Court. *See, e.g., Davis v. United States*, 495 U.S. 472, 489 (1990); *Breininger v. Sheet Metal Workers*, 493 U.S. 67, 94 n.18 (1989); *Solorio v. United States*, 483 U.S. 435, 451 n.18 (1987); *Berkemer v. McCarty*, 468 U.S. 420, 443 (1984); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981).

B. Even if Appellants have preserved the issue, their claim is insubstantial

Appellants claim that the district court erred in placing on them the burden of proving that race predominated in the creation of the 1998 Interim Remedial Plan.[6] However, it is well-settled that where plaintiffs challenge the constitutionality of a districting plan under the Fourteenth Amendment jurisprudence established by this Court in *Shaw v. Reno* and

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[6] In making this argument, Appellants attempt to draw analogies to criminal and school desegregation cases. As discussed below, these comparisons are inappropriate.

Miller v. Johnson, "[t]he plaintiff bears the burden of proving the race-based motive. . . ." *Shaw v. Hunt*, 517 U.S. 899, 905 (citation omitted). *See also Miller v. Johnson*, 515 U.S. 900, 916 (1995).

This burden does not shift during the remedial phase of such a challenge. In *Scott v. United States*, 920 F. Supp. 1248 (M.D. Fla. 1996), *aff'd sub nom. Lawyer v. Department of Justice*, 521 U.S. 567 (1997), a three-judge District Court for the Middle District of Florida considered a redistricting plan offered as a settlement of a lawsuit challenging, under *Shaw*, the constitutionality of Florida's Senate District 21. The district court received and considered objections to the proposed remedial plan by one of the named plaintiffs, *id.* at 1255, and, "in accord with *Miller*," evaluated the facts involving whether race predominated in the creation of the plan:

> 'The plaintiff's burden is to show . . . that race was the predominant factor motivating the legisiature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations.'

Scott, 920 F. Supp. at 1253 (quoting *Miller*, 515 U.S. at 916). In its affirmance of the decision, this Court did not disturb the trial court's allocation of the burdens. *Lawyer v. Department of Justice*, 521 U.S. 567 (1997).

Appellants offer no principled rationale for abandoning this Court's holdings regarding burdens of proof in the remedial phase of these cases. Appellants offer only a single ground for shifting the burden of persuasion: that such a shift "is a logical corollary of the principle that 'vestiges' of the unconstitutional plan should be eliminated,"Appellants J.S. at 16, a principle that Appellants urge this Court to adopt on this appeal (and to which

we respond *infra*).[7] This overlooks the facts that *de jure* school segregation was nearly always a pervasive, *systemwide* policy[8] with tangible, long-lasting effects[9] upon every aspect of the operations of the educational enterprise,[10] and that this Court

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[7]Appellants also suggest that shifting the burden of persuasion is supported by decisions of this Court in criminal cases, in which "the burden of proof *seems* to have been placed on the prosecutor to demonstrate that the 'taint' arising out of an illegal arrest in violation of the Fourth Amendment had been eliminated prior to obtaining a confession" (Appellants J.S. at 16-17 n.18 (emphasis added)). Appellants' hesitation in interpreting these decisions as embodying a special burden-shifting rule for "fruit of the poisonous tree" situations is well-advised, because they in fact apply only the ordinary principle that the party seeking to introduce evidence is required to establish its admissibility. Indeed, this Court noted in *Nix v. Williams*, 467 U.S. 431, 444 n.5 (1984), that although the prosecution must prove guilt beyond a reasonable doubt, "admissibility [is determined] by a preponderance of the evidence."

[8]*See Columbus Board of Education v. Penick*, 443 U.S. 449, 457-58 (1979) ("Proof of purposeful and effective maintenance of a body of separate black schools in a substantial part of the system itself is *prima facie* proof of a dual school system and supports a finding to this effect absent sufficient contrary proof by the [School] Board"); *Keyes v. School District No. 1, Denver*, 413 U.S. 189, 201, 213 (1979) (same); *id.* at 208, 210, 213 (finding of intentionally segregative school board actions in meaningful portion of school system creates presumption that other segregation in system is not adventitous and shifts burden to school authorities to prove that other segregated schools are not the result of their segregative actions).

[9]*See, e.g., Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 21 (1971) (school construction practices by segregated systems "may well promote segregated residential patterns which, when combined with 'neighborhood zoning,' further lock the school system into the mold of separation of the races").

[10]*See Board of Education v. Dowell*, 498 U.S. 237, 250 (1991) ("In considering whether the vestiges of *de jure* segregation had been eliminated as far as practicable, the District Court should look not only at

placed an affirmative duty to extirpate all vestiges of the *de jure* policy upon school districts only after a long period of recalcitrant refusals to comply with the constitutional command of *Brown v. Board of Education*, 347 U.S. 483 (1954).[11]

Neither circumstance is present in this case. First, constitutional or statutory violations are often limited to only certain districts in an overall apportionment plan.[12] Thus, the entire political process has not been distorted in the manner or to the degree that public educational systems were in the *de jure* school desegregation context. Second, the "analytically distinct" cause of action upon which Appellants' lawsuit is based was announced by this Court a little more than five years ago, in *Shaw v. Reno*, 509 U.S. 630 (1993).

Because Appellants' theories conflict with this Court's carefully constructed regime for allocating burdens of proof in Fourteenth Amendment challenges that allege racial predominance in the redistricting process, and because Appellants advance no meaningful justification for modifying that structure, Appellants' claim is insubstantial.

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student assignments, but 'to every facet of school operations'"), *citing Green v. County School Board of New Kent County*, 391 U.S. 430 (1968).

[11] *See Swann*, 402 U.S. at 13-14 (referring to dilatory tactics and resistance to *Brown*); *Green*, 391 U.S. at 438 (holding 14 years after *Brown* that "[t]his deliberate perpetuation of the unconstitutional dual system [after *Brown*] can only have compounded the harm of such a system. Such delays are no longer tolerable"); *Id.* at 439 (school boards have burden of establishing that their plans will work "now").

[12] *E.g.*, *Vera v. Richards*, 861 F. Supp. 1304, 1345 (S.D. Tex. 1994), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996) (sustaining plaintiffs' *Shaw v. Reno* challenge to only 3 of 24 questioned districts); *Thornburg v. Gingles*, 478 U.S. 30, 80 (1984) (affirming minority vote dilution findings of trial court with respect to some, but not all, districts in apportionment plan).

II. Appellants cannot demonstrate that the District Court's Factual Finding that Race did not Predominate in the Creation of the 1998 Interim Remedial Plan was Clearly Erroneous

Appellants obviously disagree with the factual finding of the court below, based upon the evidence before it,[13] that racial considerations did not predominate in the North Carolina General Assembly's construction of the 1998 Interim Remedial Plan. Because they are unable to show that the lower court's finding on this record is "clearly erroneous," *see* Fed. R. Civ. P. 52(a); *Thornburg v. Gingles*, 478 U.S. at 78, Appellants strain in their Jurisdictional Statement to identify some presumed legal error in the application of this Court's precedents. This effort is unavailing, and the Court should either affirm the judgment below or dismiss the appeal for want of any substantial question.

First, Appellants assert that this case is similar to a school desegregation case and that the district court erred by not "assuring that the 'vestiges' of the unconstitutional 1992 and 1997 racial gerrymanders were eliminated." Appellants J.S. at 7. Second, drawing an analogy between the 1998 redistricting process and the use against criminal defendants of evidence which was illegally obtained, Appellants argue that the court below should have ruled that the 1998 Interim Remedial Plan is the "fruit of the poisonous tree" of the 1992 and 1997 redistricting plans held to be unconstitutional. Appellants J.S. at 9. Finally, citing *Village of Arlington Heights v. Metropolitan Dev. Corp.*, 429 U.S. 252, 265-66 (1977), Appellants contend that the trial court erred by adhering to the standard announced by this Court in *Shaw*, and "requiring that

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[13]The district court explicitly "reserved jurisdiction with regard to the constitutionality of District 1 under this plan and as to District 12 should new evidence emerge." Appellants J.S. App. at 5a.

plaintiffs in these 'analytically distinct' actions must demonstrate that race was the predominant motive for creating" a challenged district. Appellants J.S. at 10. Appellants instead argue in favor of a rule that would condemn *any* consideration of race in shaping a remedial plan. *Id.*[14]

Appellants' arguments in support of reversal rely primarily upon two grounds: 1) as viewed by the Appellants, the Twelfth District in the 1998 Interim Remedial Plan is not "geographically compact"; and 2) the plan protected all of the State's congressional incumbents and should be deemed constitutionally invalid because it extended such protection to the African American incumbent of District 12, as well as to white incumbents. Neither of these factors constitutes proof of unconstitutionality under this Court's existing precedents and they are, therefore, insufficient to meet the rigorous standard of proof required by this Court.

In cases raising claims such as the ones raised by Appellants here, this Court has already defined an *analytically distinct* regime for determining whether a redistricting plan violates the Constitution. As pointed out above, Appellants' burden in this case was to show that "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines" in the 1998 Interim Remedial Plan, *Bush v. Vera*, 517 U.S. at 951, *quoting Miller v. Johnson*, 515 U.S. at 913, and "that other, legitimate districting principles were 'subordinated' to race." *Bush*, 517 U.S. at 958. *See generally id.* at 259-68. It is insufficient for Appellants to show, as they attempted to do here, merely that

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[14]Appellants state that only if courts apply what they describe as the *Arlington Heights* test "can a district court be assured that the 'taint' of an earlier racial gerrymander has been eliminated," Appellants J.S. at 11, suggesting that this argument is a subpart of their "fruit of the poisonous tree" contention.

inclusion of African-American voters was one factor influencing the contours of a district in the plan adopted by the legislature – or even that the entire districting process was carried out "with consciousness of race," *Bush*, 517 U.S. at 1051. As Justice O'Connor has observed:

> States may intentionally create majority-minority districts and may otherwise take race into consideration, without coming under strict scrutiny. Only if traditional districting criteria are neglected, *and* that neglect is predominantly due to the misuse of race, does strict scrutiny apply.

Bush, 517 U.S. at 993 (O'Connor, J., concurring) (emphasis in original); *see also United States v. Hays*, 515 U.S. 737, 745 (1995) ("We recognized in *Shaw* . . . that the 'legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination'") (citation omitted) (emphasis in original). *See also* Smallwood Appellees' Brief of Appellant-Intervenors in *Hunt v. Cromartie*, No. 98-85 at 32-37[15]

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[15]Moreover, legislative consideration of a non-racial factor that is *correlated* with race is insufficient to demonstrate predominance unless the court finds that it was a proxy for race. *Bush v. Vera*, 517 U.S. at 967-69. This principle demonstrates the tenuousness of Appellants' reliance upon the General Assembly's interest in protecting incumbents as an indication of the 1998 Interim Remedial Plan's constitutional infirmity based solely on the fact that North Carolina's Twelfth District Representative is African American. It is undisputed that the State sought to protect *all* incumbent members of its congressional delegation, white *and* African American; since ten of twelve members of that delegation were white, incumbency protection – which Appellants acknowledge is an appropriate legislative purpose "in the first instance," Appellants J.S. at 14 – hardly suggests that racial motives were predominant. By arguing that it was *per se* unconstitutional for the

This Court's recognition that legislatures are always aware of race in drawing district lines, and its consequent holding that legislatures may permissibly take race into consideration in that process so long as racial considerations do not predominate, carves out a limited role for federal courts in the redistricting process of States that is effective without being overly intrusive. *See Miller v. Johnson*, 515 U.S. at 915-17. The Court has refused to alter that role when a legislative plan adopted to remedy an earlier constitutionally infirm apportionment is at issue, *see Lawyer v. Department of Justice*, discussed *supra* at p. 9. Appellants have presented no convincing reason why this Court should adopt the standard they describe as the "*Arlington Heights* rule," which would bar *any* consideration of race by a legislature enacting a remedial plan. That standard would make vastly more intrusive the scope of federal courts' inquiries into districting processes, but as we show below, neither of Appellants' other arguments (the "fruit of the poisonous tree" and duty to eradicate all "vestiges" arguments) states an adequate justification for replacing the controlling decision of this Court with the Appellants' untested theories.

Appellants' "fruit of the poisonous tree" argument is not persuasive, since States are not required to discard completely

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State to protect the incumbency of the Twelfth District's African-American Congressman to the same extent as it protected other incumbents, *id.*, Appellants urge the adoption of a double standard that is intolerable under the decisions of this Court. *See, e.g., Miller v. Johnson*, 515 U.S. at 928 (O'Connor, J., concurring); *Shaw v. Hunt*, 517 U.S. at 996 (Kennedy, J., concurring). Congressman Melvin Watt was recently re-elected as the representative of the redrawn Twelfth District which is *now 65% white* in population, but Appellants nevertheless persist in arguing that the district (and a fortiori, Congressman Watt's electoral success) is the product of a racial gerrymander. There is no legal or factual basis for suggesting that such a district is constitutionally invalid.

the original challenged plan before developing a new remedial redistricting plan.[16] This argument finds no support in *Shaw*, its progeny, or in cases which define how remedies must be fashioned in voting rights cases. This Court has consistently accorded great deference to the States' policy choices in the redistricting process and has repeatedly held that the redistricting policy choices of the State should be set aside by a federal court only to the extent necessary to remedy a violation of federal law. *See, e.g., White v. Weiser*, 412 U.S. 783, 795 (1973) (in devising a remedy for a federal constitutional violation, a court "should follow the policies and preferences of the State, expressed in statutory and constitutional provisions or in reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitutions"); *see also Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) ("[F]ederal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements"). It is not enough for litigants or the federal courts to simply prefer a different redistricting outcome; rather, the State's choices may be subverted only to the extent necessary to remedy the violation. As the district court reasoned, where, as in this case, the State has enacted a new plan that fully remedies the *Shaw* violation and complies with all applicable federal and state constitutional and statutory

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[16]That there is some resemblance between district shapes in a challenged plan and those in a remedial plan is not a sufficient basis for invalidating the latter *unless the court finds that racial considerations again predominated in its construction*, for otherwise a legislature would be required to abandon its earlier plan and its incumbent officials completely. Neither the inclusion of areas smaller than whole counties in the 1998 Interim Remedial Plan, nor the re-election of its prior incumbent under that Plan, *see supra* note 15, may properly be characterized as the "fruit" of any "poisonous tree" that compels its proscription.

provisions, there is no basis for federal judicial interference with its implementation. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978); *see also Shaw v. Hunt*, 517 U.S. at 917 n.9 ("states retain broad discretion in drawing districts to comply with the mandate of § 2") (citing *Voinovich v. Quilter*, 507 U.S. 146 (1993) and *Growe v. Emison*, 507 U.S. 25 (1993)); *Burns v. Richardson*, 384 U.S. 73, 85 (1966) ("A State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause"). *See also* Smallwood Appellees' Brief of Appellant-Intervenors in *Hunt v. Cromartie*, No. 98-85 at 28-31.

Appellants' analogy to school desegregation jurisprudence fares no better. First, as noted earlier,[17] unlike the system-wide findings of *de jure* discrimination in the typical school desegregation case, findings of statutory or constitutional violations in apportionment plans often involve only a limited number of districts rather than the entire plan. There is thus no reason to search for "vestiges" of racial predominance outside the specific electoral districts held to be invalid. Second, Appellants themselves fail to indicate what such "vestiges" might be, other than the same features they have characterized as the "fruit of the poisonous tree" in their effort to change the identity of the Twelfth District Representative, *see supra* note 15. Finally, the school desegregation cases in fact support the result below.

In the school desegregation context, this Court has "articulated a three-part framework . . . to guide district courts in the exercise of their remedial authority." *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995). As this Court stated in *Milliken v. Bradley*, 433 U.S. 267 (1977),

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[17] *See supra* page 11 n.12 and accompanying text.

> In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. . . . The remedy must therefore be related to 'the *condition* alleged to offend the Constitution. . . .' Second, the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.' Third, the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.

Id. at 280-81 (footnotes and citations omitted). In *Freeman v. Pitts*, 503 U.S. 467 (1992), this Court concluded that this inquiry should focus upon "'whether the [constitutional violator] ha[s] *complied in good faith* with the desegregation decree since it was entered, and whether the vestiges of past discrimination ha[ve] been eliminated *to the extent practicable*.'" *Id.* at 492 (quoting *Board of Education v. Dowell*, 498 U.S. at 249-50 (emphasis added). Indeed, "[t]he task is to correct, *by a balancing of the individual and collective interests*, the condition that offends the Constitution." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. at 15-16 (emphasis added).

Far from calling into question the decision below, this Court's standard for analyzing school desegregation plans establishes a role for federal courts that is entirely consistent with a federal court's duty in evaluating remedial redistricting plans and comports with the process the district court in this case followed in reviewing the 1998 Interim Remedial Plan. Appellants complain that "*nothing* in the opinion of the court below reflects *any* awareness on its part of its responsibility to assure that 'vestiges' of the racially-gerrymandered 1992 plan

were not still present in the 1998 plan," Appellants J.S. at 11 (footnote omitted and emphasis added). However, predicated upon this Court's precedents discussed above, the district court did in fact engage in a careful balancing of the State's responsibilities to remedy the constitutional violation found, while fulfilling its other legitimate political redistricting objectives.[18] The court found that the State's primary redistricting goal was to create a plan to "address [the court's] concerns about District 12." Appellants J.S. App. at 3a. In

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[18]To illustrate the over-breadth of Appellants' position, we note that they argue, even though no court has ever held that the First Congressional District in either the 1992 Plan or the 1997 Remedial Plan unconstitutional, that the district court was nevertheless obligated to "assure that the First District as it exists in the [1998 Interim Remedial Plan] has none of the 'vestiges' of the earlier First District and is not the 'fruit' of that poisonous tree." Appellants J.S. at 11 n8. However, once it found a discrete constitutional violation, the district court was bound by this Court's precedents to tailor the nature and scope of the remedy to match the nature and scope of the violation. *See, e.g., Milliken*, 433 U.S. at 281-82 (the "principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation. . . ."); *Lewis v. Casey*, 518 U.S. 343, 357 (1995) ("The remedy must of course be limited to the inadequacy that produced the injury-in-fact that the plaintiff has established") (citation omitted). Since the court only found that the Twelfth District violated the Constitution, and the First District has never been held to violate the Constitution, the district court properly limited its evaluation of the 1998 Remedial Plan: "Because this [c]ourt held only that District 12 in the 1997 plan unconstitutionally used race as the predominant factor in drawing District 12, the [c]ourt is now limited to deciding whether race was the predominant factor in the redrawing of District 12 in the 1998 plan." Appellants J.S. App. at 3a. Appellants are not entitled to a remedy for a non-existent constitutional violation and, to date, no court has found a *Shaw* violation in the First Congressional District.

addition, it found that the State sought to "maintain the partisan balance of the State's congressional delegation, to keep incumbents in separate districts and preserve the cores of those districts, and to reduce the division of counties and cities. . . ." *Id.* at 3a, 4a. The court concluded that the State struck a balance that resulted in a plan that "successfully addressed the concerns of [the court]" *Id.* Therefore, despite Appellants' claims to the contrary, the district court was aware of its responsibilities in reviewing the 1998 Interim Remedial Plan and acted in accord with this Court's long-standing precedents. Offering no principled rationale for this Court to abandon its well-settled standards governing the delicate role of federal courts in the redistricting process, Appellants' appeal is insubstantial.

The district court order on appeal was firmly grounded in this Court's precedents. If plenary review is routinely granted by this Court based upon the claims Appellants raise here, this Court will be forced to evaluate and review the details of congressional or state legislative districts whenever a plaintiff alleges that they have an odd shape or that race was even a trivial consideration in their creation. The district court properly disposed of the issues before it and Appellants have presented nothing to demonstrate that the court's action was contrary to law or that its factual findings were clearly erroneous.

CONCLUSION

For the foregoing reasons, the motion to affirm or, in the alternative, dismiss should be granted.

Respectfully submitted,

ELAINE R. JONES
Director-Counsel
THEODORE M. SHAW
NORMAN J. CHACHKIN
JACQUELINE A. BERRIEN
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
99 Hudson Street, Suite 1600
New York, NY 10013
(212) 219-1900

ADAM STEIN
FERGUSON, STEIN, WALLAS,
ADKINS, GRESHAM &
SUMTER, P.A.
312 West Franklin Street
Chapel Hill, NC 27516
(919) 933-5300

TODD A. COX*
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
1444 Eye Street, NW
10th Floor
Washington, DC 20005
(202) 682-1300

**Counsel of Record*

Attorneys for Appellee-Intervenors

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No. 98-450

In the
Supreme Court of the United States
OCTOBER TERM, 1998

MARTIN CROMARTIE, *et al.*,
Appellants,

v.

JAMES B. HUNT, JR., *et al.*,
Appellees,

— and

ALFRED SMALLWOOD, *et al.*,
Intervenor-appellees.

On Appeal from the United States District Court for the Eastern District of North Carolina

APPELLANTS' BRIEF OPPOSING MOTIONS OF STATE APPELLEES AND INTERVENOR-APPELLEES TO DISMISS OR TO AFFIRM

MARTIN B. McGEE
Williams, Boger, Grady, Davis & Tuttle, P.A.
N.C. State Bar No. 22198
P.O. Box 810
Concord, NC 28026-0810
Telephone: (704) 782-1173

ROBINSON O. EVERETT*
Everett & Everett
N.C. State Bar No. 1385
P.O. Box 586
Durham, NC 27702
Telephone: (919) 682-5691
**Counsel of Record*

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SUMMARY OF ARGUMENT

Appellees have presented technical arguments designed to persuade this Court that it should not review the district court's order allowing use of North Carolina's 1998 redistricting plan. However, the plain language of 28 U.S.C. § 1253 authorizes this appeal; and the issues raised by this appeal merit full consideration by the Court. These issues concern the manner of review that a remedial plan should receive from the district court after the State legislature has twice enacted redistricting plans which violate the Equal Protection Clause. In resolving these issues, the Court can make clear that the State must bear the burden of proof that its remedial plan is not race-based and must show that the plan conforms to traditional districting principles.

I. THIS COURT HAS JURISDICTION TO REVIEW THE ORDER OF THE DISTRICT COURT APPROVING USE OF THE 1998 REDISTRICTING PLAN.

The history of this case refutes State appellants' contention that this Court lacks jurisdiction to review the three-judge district court's order of June 19, 1998.[1] After the complaint was filed on July 3, 1996, a stay order was granted

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[1]Much of this history is contained in the Appendix to the Jurisdictional Statement filed by the State appellants in *Hunt v. Cromartie*, (hereinafter "*Hunt* J.S. App.") and in the Joint Appendix filed by the parties in that appeal (hereinafter "*Hunt* J.A."). The State appellees and intervenor-appellees in this appeal are the appellants in *Hunt v. Cromartie*, No. 98-85, where they seek to overturn the district court's summary judgment that District 12 in the 1997 redistricting plan was unconstitutional and could not be used in the 1998 elections. That appeal is set for argument on January 20, 1999.

to await the outcome of the *Shaw* litigation. Then, on October 17, 1997, the stay was dissolved and an amended complaint was filed – which asked the district court to enjoin use of the 1997 redistricting plan "in the 1998 elections or any subsequent congressional elections" and to "direct the General Assembly to draw promptly a plan that is not tainted by the current plan and that is prepared without regard to race, party or incumbency." *Hunt* J.A. 8-9. The complaint alleges that the General Assembly "with a predominantly racial motive" enacted a new redistricting plan in March 1997, *Hunt* J.A. 16-17, and that because it resulted from and was "caused by the predominantly racial motivation that gave rise to the January 1992 and July 1991 plans, the March 1997 plan is the fruit of those racially gerrymandered plans – and is tainted by them." *Hunt* J.A. 18. Having alleged their standing to contest both the First District and the Twelfth District in the 1997 redistricting plan, *Hunt* J.A. 18-20, the plaintiffs prayed (1) that a three-judge district court be convened; (2) that the 1997 redistricting plan be declared "unconstitutional and of no further force and effect"; (3) that the court direct the General Assembly to prepare a new plan "which will not be derived from any earlier unconstitutional plan"[2]; (4) that the court enjoin the defendants

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[2]*See* Paragraph 3 of the amended complaint's prayer for relief, *Hunt* J.A. 21, which reads:

> The Court direct the General Assembly to prepare promptly a new redistricting plan for the State of North Carolina which will not be derived from any earlier unconstitutional plan and which will not concentrate in any congressional district persons of a particular race or color – whether black, white, native American, or otherwise – in a manner that is totally unrelated to considerations of compactness, contiguousness, and geographic or jurisdictional communities of interest; and if the General Assembly does not prepare promptly such a plan, then the Court itself prepare such a plan with the aid of suitable impartial experts.

from conducting congressional elections "until the General Assembly enacts, and the Department of Justice preclears, a new redistricting plan as prayed for in Paragraph 3 above"; and (5) that the Court "enter both a temporary restraining order and preliminary injunction enjoining" the State defendants from "taking any action in preparation for primary or general elections" for Congress "until the General Assembly enacts and the Department of Justice preclears a new redistricting plan as prayed for in paragraph 3 above." *Hunt* J.A. at 20-22.

After a three-judge court had been designated on January 23, 1998, the plaintiffs moved for a preliminary injunction on January 30, 1998, *see Hunt* J.A. 1, and alleged that in devising the 1997 plan, "the General Assembly used as its starting point the unconstitutional" 1992 plan and that "the boundaries of the Twelfth and First Districts are again predominantly motivated by race and cannot pass the strict scrutiny test." *Hunt* J.A. 38. They prayed for a "preliminary injunction prohibiting congressional elections from taking place under the congressional redistricting plan enacted by the General Assembly in March 1997.[3] After various other pleadings had been filed, the court conducted a hearing on March 31, 1998, and on April 3 entered an order which found that the Twelfth District was unconstitutional, granted "Plaintiffs' motion for a preliminary injunction and Plaintiffs' request for a permanent injunction as contained in its complaint," and enjoined the defendants from conducting any primary or general election under the 1997 plan. *See Hunt* J.S.

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[3]On February 5, 1998, the plaintiffs filed a motion for summary judgment declaring that "in the 1992 redistricting plan, the First District – like the Twelfth – was an unconstitutional racial gerrymander, and also declaring that the Twelfth and First Congressional Districts under that 1997 plan are unconstitutionally gerrymandered" and enjoining their use in the 1998 congressional election or any future election. *Hunt* J.A. 2 and 44.

App. 45a-46a.[4]

On April 21, 1998, the court entered an order directing the General Assembly to submit to it by May 22, 1998 a revised redistricting plan and stating that within "three business days of enactment of the new legislation, Plaintiffs will inform the Court in writing whether they will oppose the legislation or not, and, if they oppose the legislation, they will provide the basis for their objections in detail. Defendants will have three (3) business days to respond to any objections." *Hunt* J.S. App. 55a-56a. The same order provided that if a new redistricting plan was not approved by the court and promptly precleared by the Department of Justice, the court would "assume sole responsibility for an interim plan for the 1998 elections." *Hunt* J.S. App. 56a. The order set out a schedule for the filing period, primary and general election, "whether conducted under a legislative plan or a court ordered plan." *Hunt* J.S. App 56a. On May 22, 1998 – the deadline prescribed by the court – the defendants submitted a new redistricting plan enacted by the General Assembly the day before.

The plaintiffs then submitted timely objections to the 1998 redistricting plan, wherein they pointed out that the plan was still predominantly motivated by race and was tainted by the two preceding unconstitutional plans.[5] In turn, on June 1,

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[4]Three days later, summary judgment was entered to the same effect. *Hunt* J.S. App. 49a.

[5]In addition to a map which showed that the 1998 plan had many "vestiges" of the unconstitutional 1992 and 1997 plans, plaintiffs demonstrated that the "new" plan still linked concentrations of blacks in Forsyth County at the northern extreme of District 12 with an even larger concentration of blacks in Mecklenburg County at the southern extreme. Of its five counties, District 12 still split four; and its voters were in two different metropolitan areas and in different media markets. In the 1998

1998, the defendants filed a response in support of the 1998 plan. On June 2, 1998, an order was entered by the district court which allowed use in the 1998 elections of the plan which the General Assembly had adopted in May. *Hunt* J.S. App. 175a-180a. The order specifically noted that it had not

> made a legal ruling on the constitutionality of District 1. The 1998 plan is only approved with respect to the 1998 congressional elections, but the Court reserves jurisdiction with regard to the constitutionality of District 1 under this plan and as to District 12 should new evidence emerge. This matter should therefore proceed with discovery and trial accordingly.

Hunt, J.S. App. 179a-180a. The plaintiffs then appealed from this order.

Under 28 U.S.C. § 1253,[6] this Court has jurisdiction over this appeal. Plaintiffs were seeking a preliminary

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plan, 70% of the African-Americans in Forsyth County were assigned to District 12 – an increase from 65% in the 1997 plan; and in Mecklenburg County, the percentage of blacks assigned to District 12 increased to 90% in the 1998 plan from 84% in the 1997 plan.

[6] 28 U.S.C.§ 1253 states:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

injunction and a permanent "injunction"[7] in a "civil action" which by statute was "required . . . to be heard and determined by a district court of three judges." After "notice," a "hearing" took place on March 31, 1998. Plaintiffs initially succeeded in obtaining a permanent injunction against the 1997 plan, but the court's order of June 22, 1998 denied them the interlocutory injunction they sought against use of the 1998 plan in the 1998 elections[8] and also denied the requested permanent injunction pending a trial. Therefore, the appeal is authorized by 28 U.S.C. § 1253. Also, a case and controversy exists between the parties because the 1998 plan will be used in the next elections.[9] Furthermore, the questions appellants have presented in this appeal are important in determining whether an injunction should be granted against use of the 1998 plan in any future elections.

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[7]Unlike *Mitchell v. Donovan*, 398 U.S. 427 (1970), which state appellees cite in their brief at page 9, plaintiffs were not seeking a declaratory judgment.

[8]From the time of filing the amended complaint, plaintiffs were seeking an injunction not only against the 1997 plan but also against any new plan "derived from any earlier unconstitutional plan." The opposition they filed to the 1998 plan asserts that this plan was derived from the earlier plans. Therefore, in light of the court's order of April 21, 1998, the "opposition and objections to the revised 1998 redistricting plan" were a reaffirmation of the earlier motion that the defendants be enjoined from using any plan derived from the unconstitutional 1992 plan. The order entered by the district court on June 22, 1998 denied plaintiffs the injunctive relief that they had requested.

[9]N.C. Session Law 1998-2 provides for use of this plan not only in the 1998 elections, which have now taken place, but also in future elections unless this Court reverses the district court's decision that the 1997 plan was unconstitutional.

II. APPELLANTS HAVE PROPERLY RAISED TWO IMPORTANT ISSUES FOR REVIEW BY THIS COURT.

From the filing of the amended complaint, appellants have consistently claimed that the General Assembly was required to enact a plan not predominantly motivated by race and free from any trace or vestige of earlier unconstitutional plans.[10] In their objections to the 1998 redistricting plan, the plaintiffs contended that it violated these requirements; and they cited precedents indicating that the defendants should bear the burden of proving that the "vestiges" of the earlier unconstitutional plans had been removed.[11] Thus, contrary to the argument of intervenor-appellees, the district court was on notice of plaintiffs' contention as to the proper allocation of the burden of proof. Furthermore, even if plaintiffs had not previously raised this issue, they would not be precluded from appealing an order predicated on a finding that resulted from

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[10]In support of their contentions, appellants have used the analogy of the "fruit of the poisonous tree," *see e.g. Taylor v. Alabama*, 457 U.S. 687 (1982); *Dunaway v. New York*, 442 U.S. 200 (1979); *Brown v. Illinois*, 422 U.S. 590 (1970); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Nardone v. United States*, 308 U.S. 338 (1939). Also, they have cited precedents concerning the obligations of school boards and district courts to eliminate the "vestiges" and "traces" of racially segregated school districts. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979).

[11]*See* Plaintiffs' Opposition and Objections to the Revised 1998 Redistricting Plan (at p. 3), quoting *Brown v. Bd. of Education*, 892 F.2d 851, 859 (10th Cir. 1989); *School Bd. of the City of Richmond v. Baliles*, 829 F.2d 1308, 1311 (4th Cir. 1987). *See also* Opposition at p.6.

the district court's misallocation of the burden of proof.[12]

Appellees cite *Scott v. United States*, 920 F. Supp. 1248 (M.D. Fla. 1996), *aff'd sub nom. Lawyer v. Department of Justice*, 521 U.S. 567 (1997), for the principle that the burden of proof is on the plaintiffs during the remedial phase of a challenge to a race-based district. However, *Scott* did not involve a plan being reviewed by a three-judge district court after an earlier plan had been held by that court to violate the equal protection clause; and in *Lawyer*, this Court did not even discuss – much less approve – the trial court's allocation of burden of proof.[13] The allocation of burden of proof as to a remedial redistricting plan poses a substantial issue which the

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[12]The cases cited by intervenor-appellees in their motion (at p.8) relate to claims first asserted on appeal, and do not concern the right to appeal an order which results from a misallocation of the burden of proof. Likewise, their contention that appellants should have filed a motion to alter or amend under Fed. R. Civ. Proc. 59(e) as a condition for appealing the district court's order of June 22, 1998 is unprecedented.

[13]As to the assertion by intervenor-appellees that appellants "offer no principled rationale" for placing the burden of proof on the proponents of a remedial plan, appellants submit that the precedents they have cited concerning elimination of the "vestiges" of racially-segregated schools and excluding the "fruit of the poisonous tree" are very "principled" analogies. As to the attempted distinction of the school desegregation, *see* Intervenor-Appellees' Brief at 10-11, appellants reply that the protection of voter rights against equal protection violations is important in a democratic society; that – as the Court recognized in *Shaw v. Reno*, 509 U.S. 630 (1993) – the harms caused by racial gerrymandering are significant; and that North Carolina has been singularly recalcitrant in complying with *Shaw*'s mandate. Meanwhile, legislators and district courts elsewhere have "reembraced the traditional districting practices that were almost universally followed before the 1990 census." *See Bush v. Vera*, 517 U.S. 952, 985 (1996). Thus, in other states throughout the nation, the "vestiges" of racially-gerrymandered redistricting have been removed.

Court should answer.[14] That answer would provide guidance for the district court in determining whether the 1998 plan may be used for future elections.[15]

According to its legislative history, the unconstitutional 1997 plan was motivated in part by a desire to protect incumbents, maintain a 6-6 partisan balance, and preserve the cores of the districts in the unconstitutional 1992 plan. The purported reasons for the 1998 plan are almost identical. Appellants have consistently maintained that a remedial plan enacted to perpetuate results reached under an unconstitutional racially-gerrymandered plan is the "fruit" of the earlier plan and retains the "vestiges" of that plan. This contention was reasserted in the opposition and objections plaintiffs filed to the 1998 plan and also has been stated in the brief which appellants filed in *Hunt v. Cromartie* – where they are appellees.

In entering its order of June 22, 1998, the district court relied on *Wise v. Lipscomb*, 437 U.S. 535, 540 (1998), for the proposition that a federal district court should allow leeway for a state legislature to devise a substitute plan and that the state legislature "should not be restricted beyond the clear commands of the Equal Protection Clause." This reliance was misplaced because the present case is concerned with enforcement of "the clear commands of the Equal Protection Clause" that "traditional districting principles" should not be subordinated to race. Since the 1992 and 1997 plans subordinated these "principles" to race, it was necessary as a

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[14]See Question 2 in the Jurisdictional Statement at page i.

[15]The court's order of June 22, 1998 calls for a trial as to the constitutionality of District 1 in the 1998 plan and also allows the plaintiffs to offer further evidence as to the unconstitutionality of District 12. The allocation of burden of proof will be significant in this trial.

condition for approval of the 1998 plan for the district court to determine that the traditional districting principles were no longer subordinated to race. On this issue, the burden of proof rested on the defendants and the threshold test was that the 1998 plan complied with "traditional districting principles." The district court failed to apply this test; and so its order approving the 1998 plan was in error.

CONCLUSION

Appellants have properly raised two important issues for the Court to consider. The consideration of these issues at this time is especially appropriate because the Court has granted full review to the related case of *Hunt v. Cromartie* and also because determination of the issues raised here will provide guidance for the district court in its future consideration of appellants' ongoing effort to finally root out the "vestiges" of North Carolina's racially-gerrymandered redistricting plans. With such guidance, the court will enjoin use of the 1998 plan.

Respectfully submitted,

MARTIN B. McGEE
Williams, Boger, Grady,
Davis & Tuttle, P.A.
N.C. State Bar No. 22198
P.O. Box 810
Concord, NC 28026-0810
Telephone: (704) 782-1173

ROBINSON O. EVERETT*
Everett & Everett
N.C. State Bar No. 1385
P.O. Box 586
Durham, NC 27702
Telephone: (919) 682-5691

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**Counsel of Record*